No.

Brief

United

Filed

CITY OF NEW ORLEANS,

Petitioner and Plaintiff,

versus

JOHN A. WARNER,

Respondent and Defendant.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of Complainant.

RICHARD DOREAU,

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INDEX.

Page.

Supposed Assignment of Errors 5

Statement of the Case 7

Argument 17

I. As to Amount in Dispute 17

II. Alleged Misapprehension of Decision in Warner vs. New Orleans, 167 U. S., p. 467 18

(1) Acts of Defendant in Violation of the Doctrine of the Warner Case 19

(2) Decision in Warner Case in Accord with Jurisprudence of Louisiana, On the Doctrine of Warranty and Estoppel . 33

III. Validity of Assessments Reduced to Judgment Against Defendant 48

(a) Validity Passed Upon in Warner Case 48

(b) Validity Established by Judgment of Homologation 50

(c) Valid by Jurisprudence of Louisiana 57

(d) Validity Confirmed by Act 30, of Legislature of 1871 69

IV. City's Liability Not Affected by Constitutional Amendment of the Year 1874 72

V. Prescription of Five Years and Ten Years 79

VI. As to Plea of *res adjudicata* 93

VII. As to Alleged Absolute Decree 97

VIII. As to Errors Assigned in Court of Appeals 100

IX. As to Alleged Unfairness of the Contract of Sale 102

United States Supreme Court.

No. 640.

CITY OF NEW ORLEANS,
Defendant and Petitioner,

versus

JOHN G. WARNER,
Complainant and Respondent.

OCTOBER TERM, 1898.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COMPLAINANT.

We are embarrassed in the discussion of the merits of this case as we are without an assignment of errors by the party complaining of the decree below, but taking the various points urged for the issuance of the writ as an assignment of errors (after making a statement of the case,) we will try to answer said points in the order in which they are presented and at the same time will discuss the city's liability not only on the assessments against herself duly reduced to judg-

ment, but also her liability for the assessments against individuals—also reduced to judgment—resulting from her conduct in reference to the same, also her liability with reference to both of the above assessments to the full extent of the drainage warrants drawn against said assessments under the act of sale of June 7, 1876, resulting from the unwritten and implied warranties in said sale, as well as from the written warranties in said act of sale contained.

The grounds urged are as follows:

First. Because the amount in dispute is large (25 paragraph of petition.)

Second. Because the Circuit Court of Appeals misapprehended, and wrongfully applied the decision rendered by this Honorable Court in Warner vs. New Orleans, 167 U. S., p. 467. (26 and 27 paragraphs of petition.)

Third. Because the decision of the Circuit Court of Appeals to the effect that streets, squares and other public property were subject to assessment to pay costs and expenses of drainage, and that this had been decided in Warner vs. New Orleans, is erroneous, and that the opinions of the Supreme Court of Louisiana, under which this conclusion is said to be justified, are based on entirely different statutes from those on which the present assessments are based and do not apply. (28th and 29th paragraphs of petition.)

Fourth. Because the Court erred in holding that the constitutional amendment of the State of Louisiana, going into effect on January 1, 1875, instead of being a prohibition against increasing the debt of the City of New Or-

leans, really was, by reason of the authority therein contained, an implied affirmance of the right to complete the drainage then in progress, and implied a corresponding duty on said City to collect the drainage taxes and apply the same to the payment of the drainage warrants of the class sued upon. (30th paragraph of petition.)

Fifth. Because the Court erred in disregarding the prescription of five years under Art. 3540 of the Civil Code of Louisiana, and the prescription of ten years under Art. 3544 of said code. (31st paragraph of petition.)

Sixth. Because the Court erred in not allowing the plea of *res adjudicata* based on the decision in Peake vs. New Orleans, 139 U. S., p. 342, (32nd paragraph of petition) the scope, meaning and construction of which, it is claimed, is peculiarly within the supervisory power of this Honorable Court. (36th paragraph of petition.)

Seventh. Because the Court erred in decreeing the City was the absolute debtor of the drainage warrants sued upon, while all the bill sought to obtain was an accounting of the drainage taxes, and that, in no event, could the warrants sued upon be considered the unconditional obligations of the City until it was shown all the taxes had been lost, misapplied or misappropriated, even if then, which is denied. (33rd paragraph of petition.)

Eighth. Because of the numerous error (19) set forth in the assignment of errors filed in the United States Circuit Court of Appeals with a petition for a rehearing in that Court. (34th paragraph of petition.)

Ninth. Because the Court wrongfully allowed 8 per

cent interest on the warrants sued upon. (35th paragraph of petition.)

Tenth. Because the Court erred in not holding the contract of sale, under which the warrants in suit were issued, most unfair and inequitable because Van Norden, the seller of the property for which said warrants were given had bought the dredge boats and paraphanlia for $50,000 in 1872, and sold the same in 1876, after being in use for the intervening period for $300,000 in drainage warrants exceeding five times the amount paid for the same, and said sale was therefore a fraud on defendant. (37th paragraph of petition.)

STATEMENT OF THE CASE.

In June, 1876, Warner Van Norden was and for some time prior thereto, had been the owner of a large draining plant in the City of New Orleans, and the pledgee and transferee of a franchise granted by the Legislature of the State of Louisiana for doing drainage work.

While thus owner and transferee, as aforesaid, the legislature of said State, on the 24th day of February, 1876, authorized said City of New Orleans, in case it should be deemed advisable, to purchase the above plant and franchise, upon appraisement to be made, and when made to be paid for by drainage warrants drawn against drainage taxes, in the same manner and form as those issued under Act No. 30 of the Acts of the legislature of 1871.

The option and privilege thus granted, said City accepted, caused the appraisers therein provided for to be

appointed (to-wit: the engineer of said City, R., p. 104) who reported the value and condition of the property, (R., pp. 91 to 97), and thereafter the Mississippi and Mexican Gulf Ship Canal Company, and said Van Norden, who was the transferee thereof, executed a bill of sale for said property to said City of New Orleans, and delivered the same, and said city, in accordance with said act granting her the privilege to purchase in case she deemed it advisable to do so, delivered to said Van Norden $320,000 of drainage warrants, drawn in the form and manner provided for under said Act No. 30 of 1871, $300,000 of which were delivered for the property purchased, and $20,000 in compromise for certain alleged misappropriation of drainage taxes collected by said city. (R., pp. 97 to 104.)

This bill of sale among, other things, contained this covenant, duly signed by said city, "not to obstruct or impair, but, on the contrary, to facilitate by all lawful means the collection of the drainage assessments as provided by law, until said warrants shall have been fully paid, it being understood and agreed by and between the parties hereto, that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as herein provided for under any pretext whatever until the full and final payment of the same. (R., p. 102.)

The drainage taxes against which said drainage warrants were drawn and delivered were created pursuant to the following Acts of the Legislature of Louisiana:

In 1858 an Act was passed providing for the drainage of certain portions of the Parishes of Orleans and Jefferson (which were divided into three drainage districts) and

directing that certain proceedings be had by certain commissioners to be appointed pursuant to said act to carry on said drainage, in certain Courts, to declare the land to be drained subject to a first mortgage lien and privilege for the cost of draining the same, and the said act provided that thereafter certain assessments should be levied by said commissioners in said districts, upon the superficial or square foot of the lands situate within the drainage districts, and that assessment rolls should be prepared fixing the amount to be paid by the owners of the land, upon which suit might be brought in case of non-payment, (Statutes pp. 1 to 6). In 1861 an amendment was passed to said law providing for a summary mode of collection of said assessments, under which said rolls were to be filed in certain Courts, certain notices issued, and that thereafter said assessment rolls should, by said Courts, be approved and homologated, which approval and homologation said law dec lared should be a judgment against the owner and the property issued (Statutes pp. 8 & 9).

Under these laws some of said mortgages had been declared, assessments made and the assessment rolls homologated prior to said Act No. 30 of 1871, which abolished said commissioners, transferred their rights, privileges, property and said assessments to the Board of Administrators of the City of New Orleans, who were subrogated to all the rights, powers and facilities of said commissioners, who were directed fo collect the assessments already levied, and to levy and collect others provided for, but not then levied and collected, and further to levy and collect assessments on additional land by said act brought

within the limits of the territory to be drained, which additional land was called the Fourth Drainage District.

All the additional proceedings required to be had by said Administrators of the city were by them had, (R p. 10) and as a result the total amount of assessments levied and reduced to judgment that came under administration by the City of New Orleans, was $1,699,637.16, of which the large amounts, set out in the bill, were levied and reduced to judgment against the City of New Orleans on assessments on the area of the streets, squares and public property and these amounts and the judgments therefor are admitted to be correct in the answer (R. p. 189).

Pursuant to said Act of 1871 the drainage work was to be done by said Mississippi and Mexican Gulf Ship Canal Company (whose transferee the said Van Norden became, as aforesaid), for which drainage warrants were to be drawn, payable out of drainage taxes, and about two-thirds of the work provided for by said act was done by said Company and said transferee prior to said sale (R. p. 274), but only $229,922.69 of said assessments had been collected by said city at the time of said sale, of which $78,748.51 was in cash and of this latter $23,666.59 (R. p. 320) was used to pay drainage warrants, leaving the balance then due and to be collected on June 6th, 1876, $1,464,714.47, the balance of the warrants issued by said city for work done by said Company and said transferee having been taken up by said city by the issue of bonds prior to January 1, 1875, pursuant to the provisions of Sec. 13 of Act No. 73 of 1872 (Statutes, pp. 13 & 14), and which bonds amounted to $1,672,105.21 (R. p. 343), but this act made said bonds a

claim on said drainage taxes second in rank to said drainage warrants, for it in terms provided, "that all taxes collected for drainage and not required for payment of drainage warrants shall be devoted to the purchase of the lowest bidder of bonds issued for drainage."

In this state of affairs, and when the total amount of the above bonds exceeded the total amount of drainage taxes then uncollected by something like $200,000, the Legislature of the State, on the 24th of February, 1876, (Statutes, pp. 15 & 16), one year and nearly two months after the last bond had been issued, and when in law it had full knowledge of the amount of bonds then issued and of the taxes outstanding, passed the said act authorizing said purchase to be made and to be paid for by warrants drawn against said taxes.

The bill, after stating the above facts, sets forth, (1) That after said city acquired said plant and franchise and became vested with the exclusive right to do all drainage, sat down on the work of drainage and abandoned the work already done, thereby causing the Supreme Court of Louisiana to decide the assessments could not be collected; (2) That she openly and publicly violated her aforesaid covenant to facilitate the collection of said taxes, by her conduct, ordinances and proclamations advising the parties owing the same not to pay them; (3) That she will plead she has been discharged from all liability to account for the drainage taxes she has collected, and ought to have collected, as well for the assessments due by herself by reason of the issuance of the bonds above stated; (4) That the city never, prior to the above purchase, claimed that the

issuance of said bonds operated as such discharge, save in the case of Peake vs. New Orleans, on the 19th of March, 1885, (more than 9 years after she had acquired said plant and franchise); (5) That said Act of 1876 was an authority to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issuance of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay said purchase warrants without offset or impairment; (6) That said contract of sale was entered into by said Van Norden in consideration of the provisions of said Act of 1876, and its effects on his rights and remedies, that neither at the time of entering into said contract of sale, nor at the time of the delivery of said warrants, or at any other time, did said city disclose she would claim that the issuance of said bonds was a discharge of her liability to account for, and apply said drainage taxes, including those due by herself to the payment of said purchase warrants, that said Van Norden was ignorant that she would make such claim, and would not have made said sale if advised any such claim would be made, and that complainant, who is the owner of three of said purchase warrants, aggregating $6,000, and all other holders of similar warrants have been, by a writing annexed to and made part of the bill of complain, subrogated to all the rights and remedies of said Van Norden, growing out of said sale, in consideration of all of which complainant avers said city is estopped in equity and good conscience from pleading and maintaining said defense.

The bill prays for an accounting of said drainage fund,

and especially that the amount due by said City of New Orleans be decreed a trust fund in the hand of said city, applicable to the payment of said warrants.

To this bill a general and special demurrer was filed in the Circuit Court, alleging: 1st, want of jurisdiction, because it was said the bill showed the suit was based on an assignment of a chose of action of which the original assignor was a Louisiana corporation and a citizen of the State of Louisiana; 2nd, because the matters sought to be litigated had already been decided in favor of defendant in the case of Peake vs. New Orleans, 139 U. S. 342 and following; and 3rd, there was no equity or cause of action set out in the bill (R. p. 166).

The matters thus raised were heard in the Circuit Court and the bill was dismissed at complainant's cost, and an appeal was thereupon taken to the Circuit Court of Appeals for the 5th Circuit, (R. p. 170) and said Court, after full hearing certified the case to the Supreme Court of the United States on the following questions: (R. pp. 174 to 179.)

First. Is the City of New Orleans, under the warranties, expressed and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the Complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

Second. Should the decision in the case of Peake vs. New Orleans, 139 U. S. 342, be held to apply to the facts of this case and operate to defeat the Complainant's action?"

The first question was answered in the affirmative, and the second the Court declined to answer as not involving a distinct question, but the whole case. See 167 U. S., page 467 and following.

Thereafter said Circuit Court of Appeals declared as follows:

"The City of New Orleans, under warranties expressed and implied ontained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments in the bill, is estopped from pleading against Complainant below and Appellant here, the issuance of Bonds to retire $1,672,-105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her liability to said fund as assessee of the streets and squares. Warner vs. City of New Orleans (167 U. S., p. 467).

On the case made by the Bill of Complaint, the decision of the Supreme Court in the case of James W. Peake vs. City of New Orlans, 139 U. S. 342, does not necessarily apply to the facts of this case, nor operate to defeat the Complainant's action. It follows that the Circuit Court erred in sustaining the demurrer to Complainant's bill.

The decree of the Circuit Court is reversed, and the cause remanded with instructions to overrule the demurrer to Complainant's bill, and thereafter proceed as equity and good conscience may require." (R. p. 180.

Thereafter the mandate of said Circuit Court of Appeals was filed in the Circuit Court, (p. 182) and the Complainant amended his bill praying that in said account interest be computed on said drainage tax judgments from the date thereof, at 6 per cent per annum, in accordance with the 7th section of Act 165 of 1858, (Stat. p. 4), and that Complainant be decreed interest at 8 per cent per annum upon the warrants sued on (R. p. 184), and thereafter Defendant answered the original and amended bills among other things setting up many of the matters already decided by this Honorable Court. Said answer, (pages 186 to 202) though very long, in substance, is as follows:

Though admitting the amount of assessments as stated in the bill, and that the assessment rolls were homologated by judgment of Court, said answer contends there was only a conditional liability imposed thereby, entirely dependent upon benefits to be conferred, and that this conditional liability was only confined to assessments on private property, but that the commissioners first, and the Board of Administrators afterwards, illegally extended said assessments to the streets and square and other public property in all of the drainage districts and homologated the rolls for said assessments, and contends that said assessments and judgments of homologation are absolutely null and void because levied on public property exempt from assessment; and that the portion thereof levied and homologated prior to said Act 30 of 1871, and by said Act confirmed and made exigable, are of no validity whatever, because based on the aforesaid public property and things not susceptible of assessment, and that said assessments, on both public

and private property in the Fourth Drainage District are wholly null and void, as was decided in 22 An., p. 33, because the law and the ordinance of the Council under which said District was created and said assessment levied, and the rolls therefor homologated, were unconstitutional. The answer also alleges the city has in all things done its full duty as to the collection of the drainage taxes from the time she took charge in 1874, under Act 30 of that year, until June 9th, 1891, when a Receiver was appointed, and that in all its efforts to collect said taxes it has disregarded all Acts of the Legislature and proceedings of the Council of the City of New Orleans in any manner calculated to interfere with and prevent said collections, and that it has faithfully applied every dollar of said collections according to law and accounted for the same, and that no more of said taxes can now be collected, since the consideration of said taxes has entirely failed, and this, because of what is called the plans of the Canal Company and Van Norden were insufficient and bad, and because the work done under said plans was defective, and improperly done, and that because of these things it has become the settled jurisprudence of Louisiana that no more drainage taxes can now be collected.

It is further contended said city has fully paid and discharged all of its liability, whether based on said assessments on the streets or on private property, by the issue and delivery of $1,672,105.21 of bonds of the "drainage series," to take up and retire drainage warrants; this it is protected from any claims of holden of purchase warrant by the amendment to the constitution of the State, preventing

the further issue of bonds, and going into effect on January 1, 1875; that the matter here are *res adjudicata* against Complainant, because of the decision in said Peake case; that the claim of Complainant on drainage warrants is prescribed by five years from their date, and that the judgments of homologation of the assessment rolls are prescribed, respectively, by ten years from the date of each judgment of homologation.

Thereafter replication was filed, and after the proofs were all in, the case was duly heard by the Circuit Court, and judgment was rendered dismissing Complainant's bill with costs, (R. p. 544), and thereupon an appeal was taken to said Circuit Court of Appeals with an assignment of errors to be found at pages 545 to 548 of the record.

Said Circuit Court of Appeals reversed the decree of said Circuit Court and decreed complainant was entitled to recover, and referred the case to a master to state the account out of which Complainant was to be paid, &c. (R. 550.)

Defendant then applied for an appeal to this Honorable Court, which was allowed by one of the justices thereof, (p. 584) and this appeal was dismissed on October 24th, 1898, in suit No. 336, October Term 1898, and thereafter applied for a writ of *certiorari*, which being granted the case is now here on the merits.

ARGUMENT.

I.

The amount in dispute as an argument for reversal we dismiss as unworthy of notice. The correctness of the de-

cree below is the only matter for the consideration of the Court.

II.

As to the al'eged misapprehension and wrongful application of the de:ision rendered in this Honorable Court in Warner vs New Orleans, 167 U S., page 467.

The Court there not only answered the question submitted to it, in the affirmative, to-wit:

"That the City of New Orleans was estopped from pleading against Complainant—the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares.

But it also announced the legal principle by which this case was governed in these words:

"Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee, the bonds issued by the city (and in respect to that matter we can only refer to Peake vs. New Orleans, supra, it by no means follows that the city can draw warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into the fund, and thus, after violating its contract, promise not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of the assess-

ments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on its own action, is under an implied obligation to do whatever is reasonable and fair to make that fun good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, you must look to the fund and not to me."

How has the duty here pointed out—"the implied obligation to do whatever is reasonable and fair to make that fund good"—been performed by the city, or has it acted so as "to prevent the fund from being made good?—the fund, which, at the date of said sale on June 6, 1876, consisted of assessments against the City of New Orleans and individuals of $1,469,714.47, exclusive of interest, of which $696,394.30 was due by said city, and $773,320.17 by individuals. (These amounts are admitted to be correct. R. p. 189.)

And here we do not are to enter into any detailed discussion as to the conduct of said city as to the discharge of its duties under the drainage acts, under the Act 16 of 1876, and under the covenants in the bill of sale of June 7th, 1876, farther than to say that she has violated every duty imposed on her in reference to making said taxes collectable and collecting the same, every duty arising under the covenants in said bill of sale contained, and that every averment in the bill of complaint is true. We will, however, advert to some of the matter dislosed by the record.

When the city bought Van Norden's dredge boats and

apparatus(all of which were in the very best condition, with machinery in duplicate parts, so that if anything broke, it could at once be replaced with a new piece.) (Moody, R. p. 274). Report of Hardee (R. pp. 91 to 97) and became qualified to do the drainage work, and under the provisions of the Act of 1876 (Stat. p. —), possessed of the exclusive privilege of doing said work, she quietly abandoned said work. Moody, on page 110, (R. p. 274) after detailing the work done up to that time, and saying the work was about two-thirds completed, says there was no other work thereafter done by the city, and in fact there is no contention on the part of said city to the contrary. She not only abandoned said work, but proceeded to disqualify herself to do any work of drainage. This was judicially found in Davidson vs. New Orleans, 34 An. p. 170. See, also, reports Commissioner of Publib Works (R. p. 225 to 230).

On April 8th, 1878, by ordinance 4483, (R. p. 216) she instructed her Administrator of Improvements to advertise said dredge boats purchased from Van Norden and the Canal Company for sale. For some reason they were not sold, and on the 1st of July, 1878, by ordinance 6038 (R. p. 218) after reciting that three of said boats were then in bad condition and necessitated expense in watching, directed said Administrator to have said boats broken up, and the material stored. On March 17, 1880, after declaring parts of the wrecks of said boats, those borken up under the above ordinance, were valueless, except as old iron, and declaring the city needed lumber, spikes and nails for construction and repairing bridges, said city, by Ordinance

No. 6306 (R. p. 219) ratified an exchange of materials effected by said Administrator with Shwartz & Co., for said needed articles. On December 26th, 1880, the city surveyor, under Ordinance No. 6741, made the following report of the condition of said dredgeboats. (R. pp. 217 & 218.)

Hon. John Fitzpatrick, Administrator of Improvements,
City of New Orleans:

Sir:

In compliance with ordinance No. 6741, A. S., I have the honor to submit the following report as to the condition of the dredge boats belonging to this city:

Dredge Boat No. 1.

Now moored in Mississippi River, Algiers side, near Brady & McClellan's Dry Dock Co.; machinery on board; dipper and dipper handle lying on the bank.

Dredge Boat No. 4.

Sunk about twenty yards from dredge boat No. 1.

Dredge Boat No. 3.

Sunk in People's Avenue Canal; water foot and a half above boiler deck; impossible to ascertain what machinery the boat contains; hoisting and working chains not in sight; dipper lying about three hundred feet above the boat on bank of the canal.

Dredge Boat No. 2.

Dismantled; hull sunk in People's Avenue Canal.

Dredge Boat Clam Shell.

Dismantled and sunk in People's Canal.

Ridge Boat.

Dismantled and sunk in London Avenue Canal.

Dredge Noyes.

Now lying in Upperline Canal with machinery aboard; boat in leaking condition; inventory of tools, etc., found on board now on file in this office; also receipt for dipper loaned General Slaughter.

Your attention is respectfully called to Ordinance No. 6038, A. S., passed July 1, 1879, authorizing the dismantling of the Clam Shell, Ridge and No. 2, and ordering the machinery and old iron to be stored in Erato street yard. Ordinance No. 6039, A. S., passed March 17, 1880, shows what disposition was made of her machinery, old iron, etc., of the dismantled boats."

And thereafter, on the 5th day of April, 1881, by Ordinance 6970, the mayor of the city was authorized to issue, and on the following day did issue his proclamation (R. p. 271) advising drainage tax payers not to pay their taxes until the right to exact the same had been settled by the Supreme Court of the State (as if the validity of said taxes had not already been determined by the Courts in the First District, by the Supreme Court of said State (27 An., p. 20), and affirmed by the Supreme Court of the United States, 96 U. S. p. 97.)

But what decision did the mayor and council expect?

On the question whether the scheme which the city had entered upon after its purchase, of abandoning the drainage system and disqualifying herself to complete the same, as above stated, would be decreed a legal excuse to the tax payer for not paying his tax, and this it was declared to be by said Court in Davidson vs. New Orleans, 34 An., p. 170. In other words, whether her own failure of duty would be held as a legal obliteration of the taxes assessed against private individuals, and in this, as before stated, she was successful, for in the above case the Court, at page 175, after stating no benefits had yet been conferred to the property there sought to be relieved from the tax, etc., and speaking of "the abandonment of all drainage work, the disposition of all drainage apparatus, the impotency of the city to resume the work," etc., decided the tax could not be collected, and this has become the settled jurisprudence of the State.

After this decision a committee of the council, on the 15th day of May, 1883, (R. pp. 349 to 352) showed how the drainage tax payer, by availing himself of the benefits of the above decision could get rid of paying said taxes, and declared, "if the city, by any act of her own, would prevent the collection of the tax or annul it to the injury of warrant holders, * * * some liability might arise against the city," and concluded by saying, "they are of opinion the whole subject should be let to exhaust itself and work out its own solution," which it has been doing ever since.

And during all this time the city kept an office open, where the drainage tax payer might pay his taxes in case he saw fit to do so, but took no active means to collect said

taxes, or make them collectible, and as a result, the above report shows the collections (R. pp. 319 to 349) were not sufficient to pay the expenses of the officials of the office, and now declares that after being in charge of said collections and payments as a voluntary and contractural trustee from the time of said sale, in 1876, to June, 1891, she could not collect any more, because the same were uncollectible, because the drainage plan (which it declares was Van Norden's) was bad and the work done thereunder was poorly and defectively done, but this, as a matter of fact, is not true, as the plan (except as to a general provision for an outside protection levee, was that of the city herself, as an examination of the statutes and the ordinances of the city herself will show.

By the second section of the Act No. 30 of 1871, the Canal Company was authorized to dig a canal, and with the earth removed therefrom, to build outside said canal a protection levee in the rear of the city near Lake Ponchartrain, the location of said canal and levee, and all canals dug and levees built by said company to be designated and fixed by the Board of Administrators of the City of New Orleans, the said lake shore canal to be not less than sixty-five feet wide on the surface and fifteen feet deep in the middle, with proper sides; the said canals along the lake shore to serve as a reservoir for drainage of the city and lands in the rear, from which the drainage was to be pumped into the lake, said protetion levee to be not less than one hundred feet wide at its base and of sufficient heights to protect the city from overflow from said lake.

By the 3d section of said act, said company was authorized to excavate the canals of the dimensions and at such localities as might be fixed by said Board of Administrators, which should fully drain the area, bounded by protection levees therein contemplated, and the Mississippi River, and connect with the drainage canals there located in said area.

By the 4th section of said act said company was authorized to buid a canal and protection levee below the city to connect with the lower end of the protection levee along the lake and the Mississippi river, of a sufficient size to protect the city from overflow, on a line to be designated by said Board of Administrators, and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by said administrators, the object of these canals and protection levees being the protection from overflow, etc.

By the 5th section of said act said canal company was authorized to dig all smaller canals required for drainage of New Orleans and lands in the rear of the dimensions of 10 feet or more in width, and by the 6th section of said act said administrators were directed to locate the lines of the canals and protection levees specified in the various sections of said act, and by said section it was further provided, that, should the City Council fail to locate the lines of said canals and protection levees as in said act specified, said city should be responsible in damages, and by the 7th section of said act it was made the duty of the city surveyor or other engineer to be appointed for the purpose to examine monthly the work done by said company during

each month and measure the width and depth of the canals dug and levees built, and certify the cubic yards thereof, on which drainage warrants were to be issued, etc.

So much for what the act of the legislature required to be done by the city.

And next as to what the city did do in pursuance of the provisions of said act in reference to said plan.

On the 27th of April she adopted ordinance No. 814, declaring that, whereas the Legislature by Act 30 of 1871 had made it mandatory on the Council of the City to provide, on the part of said city, for an extensive system of drainage, to lay out the lines and fix the location and dimensions of certain canals and levees, and in various ways to recognize the claims and accounts of and make settlement with the canal company in excavating said canals and building said levees, etc., ordained as follows: (Record, pp. 244 to 246.)

Sec. 1. That all matters appertaining to drainage and the protection of the city from innundation be placed in the immediate charge of the Administrator of Improvements, aided by the city surveyor.

Sec. 2. That the Mayor and Administrator of Finance be associated with the Administrator of Improvements as a standing committee on drainage; that said committee prepare a plan of the work to be entered upon immediately, and report to the Council at its next meeting what canals and levees or extensions of present canals and levees are most urgently required, and that upon the approval of the same by the Council, the Administrator of Improvements shall authorize the canal company to enter upon the

performance of said work under his (said Administrator's) direction, and said company was notified * * * that such work, and no other, as should be performed with the consent and approval of the Council would be settled for as in said ordinance, provided, viz.:

1. The city surveyor was to measure and certify all canals and levees then existing upon the line of the works entered upon so far as the same might form part of the canals and levees to be constructed, the same to be allowed for by said company in deduction of their measurements of work performed and completed.

2. The canal work was to be measured and certified monthly, and the levee work to be certified monthly, and certified so far as the same should have been shaped and completed and sufficiently dried for the passage of vehicles thereon, it being the intention of said ordinance that said levee should have the full dimensions required after the same was dried and ready for use.

3. That the earth removed from the canals and not required for levees should be the property of the city to be disposed of as she thought proper. That nothing in said ordinance was to be so construed as to imply that the earth taken from the canal and placed upon its banks should constitute a levee, but only such deposits as the committee should decide to be necessary for levee purposes should be paid for.

On May 4, 1871, the City Council adopted Ordinance 820, which authorized said company to commence the following named work subject to Ordinance No. 814, to-wit: (R. p. 246.)

"1. Clearing Hagan Avenue Canal to a depth of twelve feet; excavating a tail-race to connect with Orleans Street tail,race, and widening and deepening Orleans tail-race through the City Park.

"2. Excavating Fourteenth Street Canal through Metairie Ridge with protection levee on upper side.

"3. Widening and deepening Marigny Canal from Bayou St. John to Elysian Fields Street."

On June 29, 1871, said Council adopted Ordinance No. 344, (R. pp. 246 & 247) wherein it

"Resolved, That the drainage committee prepare a plan for the construction of a protection levee on or near the lake shore, which, after being approved by the Council, shall be the guide for the contractor and surveyor, under the direction of the Administrator of Improvements, in the execution of the work."

On the 18th of July, 1871, the Administrator of Improvements submitted to said Council a plan for the commencement of the work on the lake shore protection levee, which was adopted, (R. p. 258) and is in these words:

"The following plan is respectfully submitted for the approval of the Council as the most practical and permanent one for the commencement of a lake shore protection levee, viz.:

"Commencing at Upperline protection levee, extending in the lake to a depth of not over one foot of water at low tide, running in a westerly direction to the New Canal; also commencing at Pontchartrain Railroad to proposed Lowerline protection levee, being a distance of about two thousand feet."

On December 13, 1871, the said Council by Ordinance 1252. (R. p. 259.)

"Resolved, That the city attorney take such legal steps as may be necessary to cause the immediate expronpriation of such land and property as may be necessary for the proposed drainage canal from Galvez Street to Carrollton Avenue, running parallel to the New Canal, at a width of one hundred feet from the New Canal or State property."

On the 16th of February, 1872, by Ordinance 1362 the said Council amended the above Ordinance 820 to read as follows: (R. p. 259.)

"First paragraph to read:

"Excavating a tail-race from Hagan Avenue to Orleans Street; widening, deepening and extending Orleans tail-race from Bayou St. John to Lake Pontchartrain; excavating the canal parallel to the New Canal—authorized by Ordinance No. 1250 (1252) administration series—and cleaning out and deepening the Hagan, Carrollton, Broad and Galvez Street Canals.

"Second paragraph to read:

"Excavating the Upperline Canal near the old Carrollton Railroad and parallel with the same, with protetion levee on the upper side.

"Third paragraph to read:

"Widening and deepening Marigny Canal from Bayou St. John to Elysian Fields Street; widening and deepening the London Avenue Canal from Broad Street to the draining machine; widening and deepennig Broad Street Canal from Marigny Canal to the line of trees of said

Canal, and widening St. Bernard Avenue Canal from Broad Street to Claiborne Street.

"Provided the Council reserves the right to stop any portion of the foregoing work at any point of its progress."

On the 21st of February, 1872, by Ordinance No. 1374, it was ordained by said Council (R. pp. 260 & 319):

"That the contemplated canal on the north side of the New Canal, as adopted in the proceedings of October, 1871, be so located that the said canal be dug out of the middle of Poydras Street, commencing at Galves Street, to Carrollton Avenue, the earth to be thrown on the river side of Poydras Street."

And on the 4th of August, 1875, (R. p. 319) said Council by Ordinance No. 3209, ordained:

"Resolved, That a drainage canal be located on Nashville Avenue to connect the Claiborne Canal with the low ground or basin between St. Charles Avenue and the Mississippi River, said work to be performed by the Mississippi and Mexican Gulf Ship Canal Company, and the city surveyor is hereby authorized and directed to locate said canal so as to cause the least possible obstructions to the street."

The above embrace all the canals dug and levees built by said company and Van Norden, and every one of them was located by the city herself. The plan, therefore, was that solely of the city herself.

And how was the drainage work done by the canal company and Van Norden? Was it well done or defectively done?

As we have already shown, the whole matter was under the direction of the Administrator of Improvements and

his committee, as well as under the supervision of the city surveyor, and under Ordinance 814 it was only such work as was actually done that was to be measured and paid for. In fact, by said ordinance the company was notified that only such as should be performed with the consent and approval of the City Council was to be settled for, and all the presumptions are that it was so done, when the measurements were made by said surveyor and when he certified the same to the Administrator of Improvements, and when the latter drew his warrant therefor. But we are not left to presumptions alone. On the 17th of November, 1874, said Administrator of Improvements reported to the Council in detail what work had been done by said company and Van Norden, from the commencement until that day, and this report on the following day was adopted and approved by the Council of the defendant (R. pp. 301 to 305).

Nor is this all. From December, 1874, to the time of the sale to the city in June, 1876, H. C. Brown (a witness for defendant) was the city surveyor in charge of the drainage work, done by said parties, and while on the stand was asked and said as follows: (R. p. 458.)

Q. How was all that work that was done by the canal company and Van Norden; was it well done?

A. It was well done; there is no question about that; never has been, I think.

We, therefore, repeat this charge, like the preceding one is entirely without any foundation.

The result of the foregoing, as to said plan and the work done thereunder is this: the plan was that of the defendant, and the work done thereunder by the canal company

and Van Norden from the time she took charge in June, 1871, to the time she purchased from said company and Van Norden, in June, 1876, was well done, and in accordance with her plan, and hence her contention that she is not indebted because the plan was bad is simply ridiculous. As well might the proprietor, who has selected and adopted his plans, and employed his contractor to do the work in accordance to said plans, say to said contractor when the work is all done and strictly in accordance with said plans, "The plans—my plans—are bad, and I will not pay you for your work."

And the weight of the evidence is that the city's aforesaid plans, if completed, would have accomplished the purpose for which it was designed. See the evidence of the following witnesses on the following pages of the Record: W. H. Bell, City Surveyor, under whose supervision said plan was two-thirds ocmpleted, p. 47; Frameaux, Bell's assistant, p. 123; Collins, Administrator of Improvements, p. 51; A. C. Bell, the present City Surveyor, p. 150; Palmer, pp. 134 and 135.

The complaint of the city now is that her former plan was deficient in interior reservoir vanals. (Brown, R. p. 451; Harrod, R. p. 467). And according to Brown, to have completed the uncompleted work on the lake shore would have cost in cash $437,500, (R. p. 457) and to make the interior canals above referred to would have cost $100,000, (R. pp. 457 and 458), or a total of $537,500, and this would have made the drainage effective, yet the city abandoned it all and rendered it incomplete and ineffective.

Surely the contntion that the city could thus abondon

her own plan of drainage, never adopt another, abandon all drainage work, render the assessments against private property uncollectible, and then say there is nothing in the fund against which said warrants are drawn and I can pay you nothing, is directly in conflict with the declaration of the Supreme Court in the above case.

It may well be that the private owner could successfully urge—just as was done in the Davidson case—that his land has not yet been benefitted; that the plans to drain and benefit the same have been abandoned, and the city has deprived herself of the means with which to carry on said work of drainage by the loss and sale of the implements wherewith to accomplish said work, but surely the city herself cannot successfully plead her own derelictions in this respect, keep the property purchased with an obligation whose value depends upon her completing said work, and pay nothing.

And the above decision of Warner vs. New Orleans, 167 U. S., p. 467, is in accord with the decisions of the State of Louisiana, and of this Honorable Court on this subject.

The form of the warrants drawn against this fund is found at R. p. 109, and in substance and effect is a check drawn by the treasurer of the City of New Orleans in favor of Van Norden. It is, in all its essentials, like a check on a bank, drawn against a particular fund, and, unlike the check at common law, is an assignment of the fund to the extent of the amount on the check.

In Gordon & Gomilla vs. Mucher, 34 La. An., p. 605, this point was expressly decided, and the distinction between the civil and common law noticed. In that case there was

a triangular contest between three creditors of the defendant over a balance outstanding to the credit of his deposit account with the Union National Bank, viz.:

1. The Union National Bank claimed the credit was extinguished because it (the bank) was holder of a dishonored draft of defendant, and had applied the credit to the extinguishment of said debt.

2. The Louisiana National Bank claimed it as holder of a check of defendant on said Union National Bank for the exact amount of the credit, which check had been duly presented to said Union National Bank and payment thereof demanded, and, on refusal, had been protested, and written notice given to said Union National Bank that it was claimed to operate as an assignment of the credit.

3. Gorder & Gomilla claimed the fund by virtue of an attachment thereof after the above proceedings.

After disposing of the calim of the Union National Bank adversely to its pretensions, said, of the claim of the Louisiana National Bank as follows:

"It will not be disputed that a written order by a creditor addressed to his debtor, directing him to pay to a third person a debt due the former, accompanied by due notice to the debtor, would comply with all the requirements imposed by Civil Code. Arts. 2642 to 2654, for the valid giving of title, delivery and complete assignment of the credit or incorpereal right referred to in the order.

"On general principles the check, its presentation, protest and the written notice herein given unquestionably fulfill these requirements.

"The question presents itself: on what principle shall we

refuse to give such a transaction the effect which is given to it under the textual provisions of our Code?

"In the slightly considered case of Case vs. Henderson, 25 An., 48, it was held that the check holder did not acquire a right af action against the bank, upon the authority of the Supreme Court of the United States in Bank vs. Millard, 10 Wallace, 152. That was a case at law, in error to the Supreme Court of the District of Columbia, where the common low prevails: first, that no such privity was created by mere presentation of the check, without acceptance by the bank, because the depositors' right was a mere chose in action not assignable without the consent of the debtor.

Choses in action correspond to or, at least, are included within the civil law definition of incorporeal rights, our law differing therein from the common law distinctly cognizes the assignability of that class of incorporeal rights known at common law as choses in action, and provides for the perfectability of such assignments by notice to the debtor and independent entirely of his consent, and, from the moment of such notice, createst a privity between the debtor and the assignee, appurtaining to a perfect legal tie. It follows that the reasons underlying the common law decisions quoted have no application or existence under our law, and the decisions, therefore, have no application as authority here.

"In a very recent case decided by Justice Miller on circuit it was held that a check, duly notified to the bank, constituted an assignment of the fund drawn against which a Court of Equity will enforce in favor of the check holder, although a Court of law will not. Bank vs. Coates,

12 Reporter, 514. Even had the check in the instant case been drawn in a common-law State upon a bank in such State, so that the rights of the check holder would have been regulated by *lex loci contractus*, yet if the action thereon had, by any means, been brought in our forum, our Courts would have looked to, and have enforced the equitable rights of the check holder, and would have maintained the assignment. Jackson vs. Tiernan, 15 La., 485. Here the check and notice operate, not merely as equitable, but equally, a perfect legal assignment."

All that was necessary to complete the assignment of the drainage tax to the amount represented by the respective warrants given in discharge of the purchase price was notice to the debtor, and this notice was given, in case of each warrant, assignment or transfer, when such warrant, transfer or assignment was presented for payment, and, not being paid, the fact and date of presentation was endorsed thereon by the Administrator of Finance. See form of warrant (R. p. 109).

Even under the common law, these drainage warrants, being orders or checks drawn against a particular fund, specially appropriated to their payment, the Court of Great Britain would hold they were an assignment of that fund. Citizens'Bank of La. vs. First. Nat. Bank, Law Reports, 6; House of Lords, 352; English Reports, 7; Moak, 36.

These drainage warrants, being an assignment of the drainage tax, the question is, where is the warranty? Under the title of the Civil Code relating to the "Assignment or

Transfer of Civil Credits and Other Incorporeal Rights," Art. 2646 says:

"He who sells a redit or an incorporeal right warrants its existence at the time of the transfer, although no warrant be mentioned in the deed."

The warranty exists though no warranty be expressed in the instrument of transfer. Foley vs. Swayne, 2 An., 880. Even in case of stipulation of no warranty, as "an assignment without any recourse or claim whatsoever against the vendor," the seller in case of eviction, is liable for the restitution of the price, unless the buyer was aware, at the time of the transfer, of the danger of eviction—that is, was aware that any realization on the transfer was a mere matter of hazard and chance—and purchased at his peril and risk. Civil Code 2505 provides as follows:

"Even in case of stipulation of no warranty, the seller, in a case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction and purchased at his peril and risk."

See also Corcoran vs. Riddle, 7 An., 268; Jenkins vs. the Parish of Caddo, 7 An., 559; Johnson & Co. vs. Boise & Frelson, 40 An., 273. In the latter case it was decided that when tranferrer of a judgment sells all his rights to it, and to a suit growing out of it, he warrants the existence of the debt at the time of the transfer, and that if the debt had been extinguished and was not in existence at the time of the sale—the very defense which the bill charges the defendant will set up here—the vendor is bound for the price. That is, if the restitution or satisfaction can be paid in money, and if not, the parties are remitted to the gen-

eral law regulating the Courts of Justice in the affirmance of contracts. Article 1937 of the Civil Code states it as follows:

"In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be on inadequate ompensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the Courts."

As was shown in Lavine vs. Mitchell, 35 An., p. 1121, this is in accord with the equity jurisprudence on this subject. See cases there cited, and especially sections 717 and 718 Stoy's Eq. In fact the warranty in like cases has been enforced by the Supreme Court of Louisiana against this defendant. In the case of Tournier vs. Municipality Number One, 5 An., 298, the court stated the facts of the case and decided in favor of said warranty as follows:

"The plaintiff claims from the defendant the sum of $3682.40 for work done and materials furnished under two certain contracts made by the municipality with Hubert Girard, for the making and laying of flatboat gunwale banquettes in the suburb Treme. By these contracts the municipality was to pay one-third of the price agreed upon, and two-thirds were to be paid by the owners of property in front of which the banquettes were to be made. The municipality paid its third, but it is alleged that the plaintiff has not been able to collect the whole of the remaining two-thirds from the property holders, from causes for which the muncipality is responsible. This suit is for the amount which the defendant has been unable to recover. The plain-

tiff had judgment in the court below and the defendant has appealed.

"It having bee determined by a court of competent jurisdiction in the last resort that the plaintiff could recover one-third of the cost of the work from the owners of property, instead of two-thirds, as was stipulated in the contract between the parties, it seems to us necessarily to follow that the plaintiff has a claim on the municipality for the deficiency. The contrator agreed to take, as the price of his work and material, the debt of the adjacent property owners for two-thirds, looking directly to the municipality for the one-third. The municipality warranted to the contractor the existence of the debt, or recompense against the property owners for two-thirds of the cost. This debt having been determined not to be due, the warranty is falsified, and the municipality is bound by it."

And the same principle was decided in Cronin vs. Municipality No. One, 5 An., page 537, where the head note is as follows:

"Where the Municipality Number One contracts with a paver, that he shall be paid a portion of the price by the proprietors of the property fronting on the pavement, and these proprietors refuse or neglect to make the payment, the Municipality is bound for the amount stipulated to be paid by the contract."

Another case, directly in point, on the question of implied warranty, is the late case of Meyer vs. Richards, 163 U. S., p. 385. In that case, as in this, the parties thought they were dealing with matter having a real existence; in that case, that the bonds had an existence, and in this case

that the drainage taxes—especially those due by the City of New Orleans—all levied, and the rolls homologated by the Courts, had an existence, had not been extinguished, and were available for the payment for the purchase warrants. In fact, the very existence of the taxes at the time of the sale, and their availability for the payment of the purchase warrants was the very consideration for the sale. The Court, after stating the law of Louisiana on the question of implied warranty and quoting the Civil Code and citing the case of Knight vs. Lanfear, 7 Rob., 172, and Pugh vs. Moore, Hymes & Co., 44 An., 209 (wherein was sought the recovery of the price paid for the purchase of unconstitutional bonds), said:

"The Supreme Court of Louisiana, after elaborate consideration, held, among other reasons, that the seller having been obligated to the warranty of the existence of the bonds at the time of the sale, and the bonds being void under the Constitution, he was obliged to return the price."

And after stating the above law was drawn from the Code Napoleon, and from the Roman law, and that under the authorities of that Court, when the provisions of the Louisiana Code and the Code Napoleon are identical, the expositions of the civil law writers, and the adjudications of the French Courts as to the proper construction of the Louisiana Code, were persuasive, quoting from the French Commentators as following, beginning at page 400:

"Marcady, in his commentary on the law of sale, thus states the rule:

"'All sales of a credit subject the seller, unless there be a stipulation to the contrary, to a guarantee of the existence

and validity of the credit, as also his right of ownership to it. Article 1693 speakes, it is true, only of the guarantee of the existence of the credit, but as the credit existing to-day, if subsequently declared to have been void, would in contemplation of the law have never existed, and also as it would be equally immaterial for the buyer if the credit had a real existence, if that existence was available only to some one else, it is evident that by an existing credit is to be understood one which validly exists, as the property of him who transfers it. One who transfers, then, is held to guarantee in three cases: (1) If at the time of the sale the credit did not exist, either because it had never existed or because it was extinguished by compensation, by prescription or otherwise. (2) If the credit should be declared to have been void, or the obligation be rescinded. (3) If it belonged to another person than the transferrer. Marcade, De la Vente, 335.'

"Troplong, in his learned treatise on the same subject, thus expounds the doctrine:

" 'In the sale of a credit, as in that of every other object, legal warranty is always understood. The vendor guarantees to the vendee the existence of the credit at the moment of the transfer although there be no expression in the contract to that effect. It is this which caused Ulpian to say: "When a credit is sold, Celsus writes in the ninth book of the Digest, that the seller is not obliged to guarantee that the debtor is solvent but only that he really is a debtor, unless there has been an express agreement between the parties on the subject." This guarantee is more strictly obligatory in the sale of a credit than in other matters,

because the right to a credit is either visible or palpable, as it is in the case of other movable or immovable property. * * * And here let there be no misunderstanding. Do not confound the credit with the title by which it is established. Both law and reason exact that the credit should exist at the time of the sale, and it is not sufficient that a title should have been delivered to the buyer. The title is not the credit. It can materially subsist, while the credit is extinguished. Thus, if the credit had been annihilated by compensation or by prescription it would serve no purpose to deliver to the buyer a title which would have nothing but the appearance of life. The buyer in such case would have a right to avail himself of the warranty. (Troplong, De la Vente, 931, 932.)'

"And Laurent, the latest and fullest commentator, says:

"'Art. 1693,' that 'the seller guarantees the existence of the credit.' We understand this word 'existence' in the sense given to it by tradition. 'Whoever,' says Loyseau, 'sells a debt or rent, guarantees that it is due and lawfully constituted, because, without distinction in all contracts of sale, the seller is bound to three things by the very nature of the contract: (1) that the thing exists; (2) that it belongs to him, and (3) that it had not been engaged to another.' Pothier resumes this distinction by saying 'that the guarantee of a right consists in the undertaking that the right sold is really due to the vendor'; and the Code is yet more brief, since it speaks only of the existence of the debt. We must, therefore, see what the existence of the debt signifies according to the explanation of Loyseau. Firstly, the vendor is held to guarantee that the debt exists

and subsists (*soit et subsisto*). If the debt had never existed beause one of the condition necessary for the existence of the contract makes default, the vendor has sold nothing; there is no subject; he is held to the guarantee; this is obvious. The same rule would apply, if the debt had existed, but was extinguished at the time of the transfer, because it is as if it had never existed. Such would be the case of a credit which was prescribed, or which had been extinguished by compensation. * * * It is necessary, in the second place, that the credit should be as constituted, says Louseau. If it is stricken with a vice which renders it void, the vendee has a right to the warranty. This is not doubtful, since the right is really annulled or rescinded, because, the judgment annulled, the credit destroys it as if it never existed.' (Laurent, Vol. 24, Nos. 540, 541, 542."

And the Court then said:

"The views thus expressed by the foregoing writers are substantially concurred in by the French commentators. Duranton, Vol. 9, p. 183; Aubrey & Rau, Vol. 5, p. 442. The Courts of France from an early day have applied the same principle."

The Court then gives two French decisions, as follows:

"In Prat vs. Dervieux the facts were these: Dervieux transferred the amount of a claim against the gomernment, which by a subsequent liquidation of accounts was compensated by a claim held by the government which resulted from another matter. The Court of Cessation held that, under Art. 1693 of C. N., the obligation to guarantee the existence of the claim at the time of the sale compelled the seller to restore the price. Journal due Palais, p. 311.

"In Revel vs. Lippman a transfer was made of a claim against the government, which was stated to be subject to a future settlement of accounts. On the ultimate liquidation it was found that nothing was due, and the Court of Cassation held that the obligation, therefore, arose to return the price paid on the sale. Journal du Palais 1625, p. 963."

In the case of Semel vs. Gould, 12 An., 225, it appears that the police jury of the Parish of Point Coupee contracted with the plaintiff for the building of a levee upon certain specific lands, it being specially stipulated that the contractor should look for payment exclusively to the lien given by law on the land for the cost of the work. But when the contractor attempted to enforce the lien for the amount due him, it appeared that the land belonged to the United States and was not liable. The contractor, therefore, sued the police jury and recovered judgment, in affirming which the Supreme Court said that:

"In making the contract for building the levee there was an implied warranty on the part of the police jury that the land on which the work was to be done belonged to a person whose property could be reached by their ordinances to defray the expenses of such work."

This case was cited in Cole vs. Shreveport, 41 A., 841, where it appears the plaintiff contracted to do certain paving, the cost of which, by an act of the legislature under which the work was supposed to be authorized, was to be done, two-thirds by the owners of the property, and one-third by the city. By a stipulation in the contract the plaintiff was to receive in payment of the city's share certain wharfage dues. After the work was done the Courts

decided that the property holders were not liable, and that the collection of wharfage dues was unlawful. These sources of payment having failed, suit was brought against the city for the price of the work. Upon appeal from a judgment in favor of the plaintiff it was contended that, having contracted to accept the wharf dues in satisfaction of his work, the plaintiff must be satisfied with the "pound of flesh" and had no recourse against the city upon the failure of the tax, but the Court refused to adopt this view of the rights of the contractor, remarking in the course of its opinion (p. 845):

"Jurisprudence has settled that, notwithstanding a stipulation specially excluding any recourse on the city, a contractor who had done useful works, and whose payment failed by reason of subsequent events which had diverted the revenues applied to his claim, could recover against the city with which he had contracted.

"That was the treatment applied by the Supreme Court of the United States in the case of Hitchcock vs. Galveston, 96 U. S., 341.

"The principle which underlies our conclusions in this controversy is so well and clearly expounded by the exalted tribunal that we are induced to make the following extracts from their decision:

" 'They, plaintiffs, are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city had power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they had proceeded to furnish materials

and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for those things the city promised to pay, and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.'"

This case of Hitchcock vs. Galveston was cited in the late case of the District of Columbia vs. Lyon, 161 U. S., p. 200. In this latter case the city and District of Columbia issued and sold certificates to raise funds to defray the cost of paving, which were payable out of special taxes to be assessed upon the property bordering on the line of the improvement. The work was done by the contractor, but the taxes could not be collected on account of a failure to make lawful assessments. To a suit on the certificates the District of Columbia pleaded that it was not liable, contending that the contractor had agreed to look solely to the special taxes for payment. The Supreme Court of the United States, in affirming the decree of the Supreme Court of the District, maintaining the validity of the certificates, held that the effect of the law:

"Was to charge the municipality, not with direct indebtedness for the work done under its ordinance, but with a duty to work out a payment thereof by seeing to it that

the cost should be charged as a lien and collecting the special tax from the lot owners."

And a failure to perform this duty made the district liable.

And the city's express warranties contained in the bill of sale under which the warrants sued on were issued (R. p. 102) are equally conclusive against her. Her agreement not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of the drainage taxes until the warrants were fully paid, and apply said collections solely to the payment of said warrants, is an express warranty, as strong as human language can make it, that there was a tax to pay said warrants, and that the same was available for that purpose. Any other construction would make said covenant a meaningless affair.

And upon these warranties, implied and expressed, Van Norden relied when he sold his property and accepted the drainage warrants in question therefor. This most clearly appears from the evidence of Van Norden (R. p. 247), and from the evidence of E. C. Palmer, (R. p. 251) who had loaned Van Norden large amounts of money to carry on his drainage work and was familiar with Van Norden's affairs. This evidence is uncontradicted.

And the evidence of said Van Norden further shows that the city officials assured him that the city would go on and complete the drainage work, and that their desire for getting the plant and franchise was that they could do said work cheaper than the price paid to him (p. 248). And the consequence of such representations thus relied upon thus stated by the Supreme Court of the United States Dickerson vs. Colgove, 100 U. S., page 320:

"The law on this subject is well settled. The vital principle is, that he who by his language or conduct induces another to do what he would not otherwise have done, shall not subject such person to loss or injury. Such change of position is strictly forbidden. It involves fraud and falsehood and the law forbids both."

III.

As to the validity of the assessment on streets, squares and other public property duly reduced to judgment by Courts of competent jurisdiction,

1st. We think the validity of these assessments has already been passed upon in this Hon. Court. The assessment against the City of New Orleans are alleged in the 11th paragraph of the bill (p. 10 of the record) to be as follows: 1st District, $223,110.60; 2nd District, $190,885.47; 3rd District, $207,441.46; 4th District, $65,956.77; and the homologation of said assessments—that is, their reduction to judgment—are set out in the 10th section of said bill, while the proceedings of said homologations and the detailed items of assessments making up the above amounts, are given in the exhibits filed with and made part of said bill, as follows: 1st District, pp. 21 to 45, and the detail of the items making up said sum in said district, pp. 37 to 45; 2nd District, Parish of Jefferson, pp. 46 to 57, and detail of the items, making up the portion of said amount in said parish, pp. 51 to 52; 2nd District, Parish of Orleans, pp. 58 to 70, and detail of the items, making up the portion of said amount in the Parish of Orleans, pp. 63 to 65: 3rd District, 70 to 80, and detail of the items, making

up said amount, pp. 75 to 76; 4th District, pp. 80 to 91, with detail of the items, making up said amount in said district, p. 90.

To the bill averring the above assessments on streets and squares there was, as already stated, a general and special demurrer, and after the Circuit Court had dismissed said bill and an appeal had been taken from its decree to said Circuit Court of Appeals, this precise question of the validity of said assessments was fully argued before, and submitted to that Court, and upon the basis, and solely upon the basis that said assessments and the judgments based thereon were valid, that Court submitted this question—which is its vitals carries said validity—to-wit: "Is the City of New Orleans * * * * estopped from pleading against the Complainant the issuance of bonds, * * * to retire drainage warrants * * * as a discharge * * * from her own liability to that fund as assessee of the streets and squares?"—not an imagined or supposed obligation, but a real, actual, and subsisting obligation as assessee of said streets and squares. These assessments on said streets and squares and the judgments of Court thereon being alleged in the bill, set out in detail in the exhibits thereto attached and made part thereof, the Court of Appeals must necessarily have found they were valid and imposed liability before it propounded said question to the Supreme Court. If this is not the fact then said Court of Appeals was only experimenting with this Honorable Court and submitted to it a moot question, and was making this august tribunal but a moot court, and, as such, it decided only a moot case. Surely this was not and could not be the case. The lan-

guage of the Supreme Court of the United States in Bissel vs. Spring Valley Township would instantly reject such an idea, where at the bottom of page 232 it said:

"Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy."

The affirmative answer to the above question is a declaration of the existence and validity of the assessments levied for a local improvement, from which the city was not discharged by the bond issue, and if not then the Court—as above stated—merely decided a moot case and without any consideration of the vilidity of the assessments on which said question was based.

And here we beg to observe, that the opinion of the Circuit Court, Peake vs. New Orleans, 38 Fed. Rep., p. 781, relied upon by defendant, instead of being a declaration of the invalidity of the assessments on the streets and squares, is an unwilling admission of their liability as declared by the highest Court of the State and the Legislature of the State.

2d. But suppose we are mistaken in the above and that the city's liability on the judgments of the State Courts based on the assessments on the streets and squares has not been already decided, or at least, recognized by this Court, then we say that question cannot now be entered into for various reasons, and among them as follows:

(a). There is no longer any assessment, but the same

has been merged into a judgment, just the same as promissory notes cease to exist, or have any force from the moment they are reduced to judgment, Oakey vs. Murphy, 1 An., p. 372; Denniston vs. Payne, 7 An., 334. In W. Feliciana R. R. Co. vs. Thornton, 12 An., p. 738, the Court said:

"The promissory note which the plaintiff sued upon in Mississippi has no longer a legal existence; it is merged in the judgment, and it can only be severed from it by the reversal or recision of that judgment. Abat vs. Buisson, 9 La., 418; Oakey vs. Murphy, 1 An., 372; Small vs. Creditors, 3 An., 386; Denniston vs. Payne, 7 An., 333.

(b) The assessments on the streets and squares being reduced to judgment by the State Court, but two questions are open for inquiry, viz.: jurisdiction, and day in Court. Christmas vs. Russel, 5 Wall, 305; Thompson vs. Whitman, 19 Wall, 457; Renaud vs. Abbott, 116 U. S. A., p. 277.

In Mills vs. Duryea, 7 Cranch, p. 481, it was expressly held "*nil debit* is not a good plea to an action founded on a judgment of another State." Surely this is conclusive of the matter here conteded for. And that the Court had jurisdiction and the city day in Court, the copies of the proceedings from the State Court show said proceedings were had in the Courts designated by the statutes of the State. And especially did the city have a day in Court for the judgment of homologation in the Third and Fourth drainage districts for the whole amount, and for the nine instalments of the assessment in the First District was rendered at the suit of the city herself, (R. pp. 72 to 88).

In the case of the United States vs. New Orleans, 98 U.

S., p .381, there had been a judgment rendered against the city on certain bonds, and a petition for a mandamus was filed to compel the payments thereof, and various objections were raised to the legality of said bonds, and it was contended their payment was confined to a certain fund, but the Court, at page 395, said:

"In the present case, the indebtedness of the City of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property revennes, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideation now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus contained is conclusive on this application that none existed."

And a judgment rendered upon an assessment for taxes is just as conclusive as a judgment rendered upon any other cause of action, and cannot be attacked collaterally. In Driggers vs. Cassady, 71 Ala., page 533, the Court said:

"It is no objection to the application of this principle that the present is a proceeding to enforce the collection of delinquent taxes. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the taxpayer, this principle, forbidding the callateral assailment of judgments, has often been successfully invoked in actions of this nature. It has accordingly

been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempt from its influence. Burroughs on Tax, 285-6; Freeman on Judg., Sec. 135; Wellshear vs. Kelley, 69 Mo., 343; Ethel vs. Foote, 39 Cal., 439."

In Cadmus vs. Jackson, 52 Pa. State, page 295, there had been a judgment for taxes which had been paid before any lien was entered for them, yet the Court held that after judgment had been entered for said taxes, said judgment could not be attached collaterally, and, at page 305, said:

"It is answered, in the first place, that the taxes were paid before the lien was entered for them, and that all judicial process founded upon paid taxes was null. This answer cannot prevail, because there is the judgment for the taxes in full force, and it cannot be collaterally impeached."

Free on Judgments, Sec. 135, said:

"Jurisdiction being obtained over the person and over the subject matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but not so as to reach those who have in good faith relied upon its correctness. The same rules apply to actions to recover delinquent taxes as in other cases, in respect to collateral attacks. It cannot be shown, to avoid the effect of such judgments, that the taxes were previously paid. Neither will such judgments be any the less effective because it appears from the judgment roll that the assessment was illegal and void."

In the case of Mayo vs. Foley, 40 California, p. 281, there had been a decree based on an assessment which on its face was void, and under such decree a sale had been made and the property was purchased by the plaintiff, who brought the above action to recover possession of property purchased. The Judgment was for the defendant and an appeal was taken and to the Appelate Court where the appellee contended that inasmuch as the tax decree showed it was based on a void assessment the sale thereunder was also void, but the Court decided otherwise and gave a new trial, and, at page 282, said:

"To establish title in himself to the demanded premises the plaintiff offered in evidence at the trial certain judicial records, by which it appeared that the people regularly instituted an action against the defendant, Foley, and also the demanded premises themselves, for the recovery of certain delinquent taxes, and that Foley and the real estate were regularly served with process in the action; that a general default was made, and it was by the Court, thereupon, adjudged and determined that the allegel taxes had been duly and properly assessed, and were delinquent; and th premises were directed to be sold by the Sheriff of Sacramento County to satisfy the judgment and costs. The sale was made by the Sheriff in substantial pursuance of the decree, and the plaintiff became the purchaser at the sale, and ultimately received the Sheriff's deed for the premises.

"These records were, however, excluded by the Court below, upon the objection made by the defendant that it appeared therefrom that the original assessment was void,

and because the decree itself was void, in that it directed the several lots to be sold together for the aggregate amount of taxes upon all of them, instead of directing each lot to be separately sold for the tax due upon each.

"The Court below erred in excluding the evidence upon that ground.

"If the sale had been, in fact, made upon an alleged assessment for taxes and a subsequent delinquency in their payment, the purchaser at such sale would have been bound to maintain the legal validity of the assessment in the first instance, and of all the proceedings thereafter had, through which he claimed to have derived title to the premises. But the sale here was had pursuant to a decree of a Court of competent jurihdiction, entered in due form of law, and after the requisite service of process had been made. It is true that the decree itself was entered because of the alleged delinquency in the payment of the tax, to the regularity in the levy, of which objection is now sought to be made. But the legality of the assessment in the first instance, and the fact of the delinquency in its payment, were the very questions made in the suit which resulted in the decree itself, and it was directly determined and adjudged therein that these taxes were legally levied and were due and unpaid.

"This is onclusive alike upon Foley and the premises, of the truth of the matters so adjudged, until the decree shall be in some way reversed or set aside by direct proceedings had for that purpose.

"That no mere collateral inquiry upon this point can be allowed, however, is too well settled to require argument

or illustration to maintain. The purchaser of real estate at a sheriff's sale, in order to establish in himself such title as the defendant in execution had, is only held to show a judgment of a Court of competent jurisdiction (no matter if it be erroneous on its face), valid process issued to the sheriff therein, and a sheriff's deed made upon a sale thereunder."

And this case was affirmed and followed in the like case on Anderson vs. Rider, 46 Cal. 134.

And the law of Louisiana as to the conclusiveness of a judgment rendered by a Court of competent jurisdiction, after due notice, is the same. In the Succession of Quin, 30 An., p. 947, it was held:

"A judgment rendered by a Court of competent jurisdiction, and where parties have been duly cited, cannot be attacked in any collateral way, even by third persons not parties to it."

In Starns, et al., vs. Handot, et als., 42 An. 366, it was decided:

"A judgment rendered by a Court of competent jurisdiction, where the proper parties have been cited, must have full force and effect until set aside by direct action. It cannot be attacked collaterally."

This was clearly recognized by the plaintiff in Davidson vs. New Orleans, 34 An., p. 170, where she brought her direct action to have the drainage judgments as to her property rendered in operative.

But in the First District, for nine instalments of the assessment on streets and squares ($233,111.60), and in the Third District, for the full assessment on said streets

and squares ($207,471.46), and in the Fourth District, for full assessment on said streets and squares ($65,956.75), the judgment of homologation of the said assessments were rendered at the request of the city herself, and were, therefore, confessions of liability on such assessments on said streets and squares.

Such a judgment cannot be set aside for nullity by a party confessing its liability. Kilgore vs. Nicholson, 26 An., 633.

And the decree of homologation of said assessments in said First District was rendered by the Supreme Court of Louisiana, 27 An., p. 20, (Record, p. 28) and was afterwards affirmed by the Supreme Court of the United States; 96 U. S. R., p. 97, where it was declared the judicial proceedings therein had in the Courts of Louisiana did not deprive the assessees of their property without due process of law.

And there can be no doubt that the homologation of the assessment roll at the request of the city was a final and executory judgment against her. See Capdeville vs. Irwin, 13 An., p. 286.

3d. But suppose we are still mistaken in that this Court has recognized and passed upon said liability of defendant on the assessments on the streets and squares reduced to judgment, that the defendant has the right to attack said judgments of homologation collaterally, then we say that under the statutes and the settled jurisprudence of Louisiana said assessments were and are legal.

The statutes of 1858 required the commissioners to make a plan of their respective districts, designating the limits

thereof, the subdivision of the property therein contained and the names of the proprietors." Sec. 7, p. 3, of Statutes. And the Court was required by the same section to decree "that such portion of the property situated within said limits is subject to a first mortgage lien," etc.

By section 8 of the same statute each board was authorized and empowered to levy a "uniform assessment or assessments upon the superficial or square feet of lands situate within the draining section or district of such board." (Stat. p. 4.)

Similar language is also contained in section 2 of the law of 1859 (Stat. p. 6) which provides for an assessment to pay bonds which might be issued by the Drainage Commissioners, and in section 5 of the same act (Stat. p. 7), providing the manner in which money should be raised to maintain the drainage work after completion.

In the law of 1861 (Stat. p. 8), where provision is made for judgments to be entered against lands assessed and the owners thereof, "assessments made upon property within the limits" of certain territory is spoken of and the "names of the owners thereof" is required to be given. There is not a hint anywhere in these statutes that public property is to be exempted from assessment. All the property within the limits of the drainage district is to bear the burden of the assessments. And evidence is furnished that the public property and streets and highways were to be included by the language contained in section 8 of the act of 1859. (Stat. pp. 7 and 8.)

It is therein provided that the Boards of Commissioners shall at all times have access to any plans or parts of plans

of the City of New Orleans and Parish of Jefferson, "the same to include the street or streets, road or highway of any portion or section thereof to be drained, according to the provisions of this act and the acts to which this act is amendatory."

When we consider that these boards of commissioners were to make the assessments, the inference is strong that these plans, including streets and roads, were to be used to aid them in their duty of assessing said streets and roads.

And an assessment upon the streets and public property under the old drainage law of 1835 was declared legal by the Supreme Court of Louisiana in New Orleans Draining Company, praying for the confirmation of a tableau, 11 An., page 338, where at page 337 the Court said:

"While we feel the almost impossibility of doing justice among so many persons with conflicting interests, we are satisfied that whether we adopt the area or the value of the lots as the plan upon which the assessments is to be made, it will approximate the right so nearly that less injustice and injury will be done, by adopting either, than by sending the case back for prolonged litigation and further proof upon this question.

"The principle that it costs as much to drain one foot of land of little value as it does to drain an equal area of more value, and that were alike both benefited, prevailed as to the land below the ordinary level of high water in the lower coast. This seems to be recognized by the third section of the Act of 1839 which directed the appraisers in

making the distinction to take into consideration the extent of the individual properties.

"The large proportion of the expense which by this view is thrown upon the city for these streets, meets in some measure that equity which has been urged upon our consideration, that as the work has been undertaken for the public good the public ought to bear the charge of it, notwithstanding the benefit to the owners of the soil."

In Marques vs. The City of New Orleans, 13 An., p. 319, the Court expressly held the City was owner of Claiborne Street (middle of neutral ground), and as such owner liable to pay for paving or shelling the street, just as the private owner on the opposite of said street was liable. The case is stated by the Court as follows:

"Plaintiff contracted with the City of New Orleans to level, grade and shell a tract twenty feet wide on Claiborne Street, on the north side of the middle ground of premenade of said street, from St. Bernard Avenue to the Elysian Fields Street, in the Third District, of the City, at the rate of $2.46 per running foot.

* * * * * *

"In the case at bar, as the city owns on one front, if she were not liable, then only one-half of Claiborne street and of streets similarly situated could be paved.

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 119 of the city charter, but also because the middle ground in Claiborne street is the property of the city and intended or dedicated as a public promenade and for the public good and enjoyment. It is then just when the

city has property of this character, that she should pay her proportion of expenses necessary for the construction of a public highway along the border of her property, and not coerce opposite proprietors to pay the whole, and thus tax them in particular to enable the community to enjoy a pleasant promenade and free circulation of air."

In this case Justice Spofford dissented from the reasoning of the Court, and said that in his opinion the city was not owner of the middle ground of Claiborne street, and that the same was a "public thing" and exempt from assessment, but concurred in the decree of the court on the ground that the city was liable on her implied warranty, under the authority by him cited, which is noticed under the head of estoppel and warranty.

In this case it is, therefore, clear that it was directly decided, and against the opinion of Justice Spofford, and the doctrine here contended for by the defendant that the City of New Orleans could be legally assessed on public property for a local improvement.

This case was directly followed in Correjolles vs. Succession of Foucher, 26 An., p. 362, where the Court at page 363 said:

"It seems that the only question in which the defendant is concerned, presented in this case, was decided in the case of Marquez vs. The City of New Orleans, 13 An. 320. In that case the Court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound for one-half the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the

proprietors on the north side. That case and the one at bar seem identical. With that view of the case the judge *a quo* decided in favor of the defendant, and we think correctly.

Both the above cases were examined and approved in Asphalt Paving Co. vs. Gogreve, 41 An., pages 259 and 260.

Besides, Act 30 of the law of 1871 expressly "confirmed" the assessments, as shown by the books of the first, second and third drainage districts, under the Acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory thereto." (Stat. Sec. 9, p .12.)

In the proceedings to homologate the assessment in the first district for the first instalment thereof, the proceedings were carried on at the instance of the original drainage commissioners, before they were succeeded by the Board of Administrators of the City of New Orleans, and the city appeared and appealed from judgment of homolo- quiesced in the judgment. (R. pp. 24, 37 to 41 and 266 to 269.)

No other opposition was ever made by the city to the entry of these judgments against her. On the contrary, judgment upon all except said first instalment in said First District, and upon the entire assessment in the Second District, both in the Parish of Orleans and Jefferson, that is, upon nine instalments in the First, and upon all assessments in the Third and Fourth districts, were rendered upon the application of the city herself.

And when, as a matter of precaution, it was thought desirable to revive said judgments of homologation (for it

was in fact not necessary to revive them), because the statute under which they were levied (Stat. page 4, latter part of Sec. 7), declared they "should attach to said property until the amount assessed and the interest thereon shall have been paid in full," the city herself went into Court and filed necessary proceedings (which are still pending), and prayed for their revival, thus judicially admitting their validity without exception or qualification. (R. pp. 54 to 57; 67 to 68; 78 to 80.)

The effect to be given to the judicial declaration of a party, and even to those of the State, has been the subject of frequent investigation and decision in the courts of Louisiana. In Folger vs. Palmer, 35 An., p. 744, the Court said:

"Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine, which firmly binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made. (Farrar vs. Stacy, 2 An., 211; Gridly vs. Connor, 4 An. 416; Dunham vs. Williams, 32 An. 962; Gilmore vs. O'Neil, 32 An. 979; Dickson vs. Dickson, 33 An. 1370). The doctrine is so firmly sanctioned by both reason and justice that our courts have unhesitatingly extended it to the State itself. State vs. Taylor, 28 An. 460; State ex rel. Morgan, 28 An. 121; State vs. Ober, 34 An. 360."

In the State of Louisiana vs. Ober, 34 An., p. 361, the Court said:

"There is no question that were the original vendor a private individual, it would be precluded by such action from again claiming the land, and instituting suit for its recovery, on account of defects or irregularities attending

the proceedings under which he had first sold the property. He could not and would not, under such circumstances, be listened to. Plaintiff's counsel contends that this rule does not apply to the State, and es pecially as the bene does not apply to the State, and especially as the bene an interest in the lands embraced therein.

"We think otherwise. In the case of the State vs. Taylor, 28 An. 462, it was held: 'That the State is bound by her pudicial pleadings and admissions the same as private persons, and is entitled to no greater right or immunity as a litigant than they are. Nor is this rule of law varied by the fact that there are others interested in the subject matter of the proceedings conducted by the State. If any persons have been injured by the action of the Stat, good faith and a sense of justice should incline the State to make reparation as all other fiduciaries should do under like circumstances, even admitting their existence; but such conditions cannot effect the rules of law nor modify the liability and status of the State in a judicial proceeding in a suit where the State seeks to recover the lands as owner, and where the legal title under the Federal grant was vested solely in the State."

The matter of local assessments has been the subject of judicial inquiry and decision in other States. In the ase of County of Mc Lean vs. City of Bloomington, 106 Ill., page 209, all the objections here raised were there considered and decided, and said objections and their decision are so clearly stated and answered that we cannot do better than quote the language of the court, beginning at page 213, where the court said as follows:

"The objections may be included under three heads: First, the property is exempt from special assessments;

second, the statute under which the city is proceeding does not authorize any assessment against property of the county; third, the judgment cannot be enforced by sale of the property, and not other mode of enforcing the payment of such judgment can be resorted to.

"It is not claimed the first objection has the direct sanction of the statute in its support, but the contention is, such property is expressly exempt from taxation, and special assessments are included within the meaning of the word taxation. We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments, to now admit that it is even debtable. Trustee, et al., vs. City of Chicago, 12 Ill., 403; Higgins vs. City of Chicago, 18 id. 276; City of Chicago vs. Colby, 20 id. 614; City of Peoria vs. Kidder, 26 id., 352; Wright vs. City of Chicago, 46 id. 44; Nix. v. Post. id. 121. The distinction between taxation and special assessment is, also, clearly made in our present Constitution, (secs. 1-5, 9, art. 9,) and while providing that the General Assembly may exempt the property of the State, counties and municipal corporation from the former, (section 3, supra.), makes no such provision in regard to the latter, but on the contrary, by section 9, supra., authorizes the General Assembly to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments,' without any restriction as to the property to be assessed.

"The second objection rests entirely upon the assumption that to include the property of the counties it should be expressly named—that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The

exemption, not the inclusion, must specifically appear. General language, like that under which the city is proceeding, includes the property of counties, cities, etc., as well as private property. Higgins vs. City of Chicago, supra; Scammon vs. City of Chicago, 42 Ill., 192; Cook County vs. City of Chicago, 103 id. 646.

"There is not the slightest analogy between Fagan vs. City of Chicago, 84 Ill., 227, and the People vs. United States of America, 93 id., 30, cited by counsel for appellant. There the question related to the right of one sovereignty to invade another. The relation between the cities and villages and counties is totally unlike that between the government of the State and the general government of the United States. Cities, villages and countries are mere agencies of the State, by and through which to conveniently administer local government. In the absence of express constitutional restraint the General Assembly might abolish them, one or all, and substitute other and entirely different agencies in their stead. We have repeatedly held that, though the fee of streets is in the city, she has no private property in them, but holds them in trust for the use of the public—not the citizens of the city alone, but the entire public, of which the Legislature is the representative. Chicago vs. Rumsey, 87 Ill., 355; The People, ex rel., vs. Walsh, et al., 96 id. 232; City of Chicago vs. Union Building Association, 102 id. 379. So here, instead of one sovereignty invading another, as in the cases referred to, we have the General Assembly simply authorizing that property held by one of its agencies shall be burthened with a charge for the benefit of another of its agencies to the extent it has been benefitted by that agency, in regard to a matter in which the citizens and property

owners within the territorial limits of such last named agency has no exclusive interest, but only an interest in common with the entire public. The question relates purely to the right of the State to apportion a public burden upon public, in common with private property, in proportion to the benefits conferred upon that property, and in nowise involves any questions conferred upon that property, and in nowise involves any questionh of conflicting sovereignties.

"The remaining objection, we think, involves no serious difficulty, though, at first blush, it may seem to do so. We certainly do not hold the court house square may be sold and the title passed to private parties, or to the city. In Taylor vs. The People, ex rel., 66 Ill., 322, we held, explaining Scammon vs. The City of Chicago, supra., that in such cases the amount should be paid out of the treasury. Should this not be done, mandamus would lie to compel it. (City of Olney vs. Harvey, 50 Ill., 453). And it seems that the judgment at law must precede the mandamus, the latter being in the nature of process of execution of the former. The People ex rel. vs. Board of Supervisors, 50 Ill., 213.

* * * * * *

"Some objection is taken to the form of judgment, but this we regard as of no moment. No execution can issue upon the judgment, nor can the court house square be sold by virtue of it. If it shall not be paid without coercion, that coercion must be by mandamus against those who properly represent the country, and are derelict in the performance of their duty in that regard."

In Higgins vs. The City of Chicago, 18 Ill., at page 280, the court said:

"The assessment of public taxes, or special assessments for public improvements, upon the public property of the State, county or municipal corporations, is a mere question of policy. The power exists to make it bear its share of the one or the other. Canal Trustee vs. Chicago, 12 Ill., R. 405; Ross vs. Mayor of New York, 3 Wend. R. 335.

"The language authorizing an assessment on property for benefits from laying or extending streets (Chapter Cap. 6, Sec. 2) is very broad and comprehensive, and no reason is apparent why the public square may not receive a due share of the benefit with any other realty on the same street. The corporation of the city or the county may, if not specially exempted, justly pay a part of the assessments proportionate to the benefits conferred by the improvements. Such mode of apportioning the burthen is very just and reasonable, for under it alone many taxpayers will contribute a share for the benefits bestowed on their property in common, who, otherwise, would pay nothing, and yet enjoy the benefits resulting from the improvement."

And the distinction between taxation and local assessment has been often declared by the Supreme Court of Louisiana. In the case of Charnock vs. Levee Co., 38 An., p. 326, the court said:

"But in the course of time the matter has been considered over and over again in our own courts, and in the courts of sister States and by an inveterate course of decision, with rare exception, it has ripened into the settled principle of constitutional construction, that local assessments or contributions provided for the purpose of constructing public works for the advantage of particular districts and levied on property benefited thereby and with reference to such benefit, are not considered as taxes

within the meaning of constitutional restrictions on the power of taxation. Board vs. Lorio Bros., 33 An., 276; Railroad vs. Board of Health, 36 An., 666; Burroughs on Taxation, Chap. 22; Cooley on Taxation, Chap. 20."

See also Barber Asphalt Co. vs. Gogreve, 41 An., pages 263, 264 and 265, where a large number of authorities from various States and text writers are collected and cited, and among them the Drainage Case, in the 11th An., p. 371, arising under the Act of the Legislature of 1835.

The effect of a statute similar to the provision of Act 30 of 1871, under which the previous assessments were confirmed and made exigable, has often been declared by the Supreme Court of the United States. In New Orleans vs. Clark, 95 U. S., p. 644, the court, at pp. 654 and 655 said:

"The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."

This doctrine was fully recognized in Read vs. Plattsmouth, 107 U. S., where the court, at page 575, quotes the above language.

The same principle was recognized and applied in Gran-

ada County Supervisors vs. Brogden, 112 U. S., p. 261, where the head-note is as follows:

"A municipal subscription to the stock of a railroad company or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given."

See also Anderson vs. Santa Anna, 116 U. S., pages 356 and 364.

And these assessments against the City of New Orleans are not effected by the fact, that perhaps, the public property on the area of which they are levied cannot be sold in default of voluntary payment by the city, to pay said assessments.

It was claimed in the Court of Appeals that even if the various drainage acts imposed an obligation on the city to pay the special taxes assessed against it as quasi owner of the streets, squares and public places, and if the Act of 1871 confirmed these assessments and made them exigible, *i. e.,* payable by the city, still these status are inoperative because they prescribe no mode for the enforcement of the obligation, otherwise than by the foreclosure of the tax privilege, and the sale of these public places, which are beyond the power of either the legislature or the municipality to alienate. But we are relieved of all difficulty on this point by the decision of the Supreme Court in United States vs. New Orleans, 98 U. S., 381, since affirmed in Wolff vs. New Orleans, 103 U. S., 358, involving the liability of the city to pay the principal of bonds issued under authority of a statute of the State of Louisiana, which

provided for the levy of taxes to pay the yearly interest due thereon, but made no provision for the payment of the principal at maturity. Mr. Justice Field in discussing the question states that when municipal corporations are created the power of taxation is vested in them as an essential attributes for all the purposes of their existence, unless its exercise be, in express terms, prohibited, and that in a city like New Orleans, situated on a navigable stream, their powers are usually enlarged so as to embrace the building of wharves, docks and levees, and roads, and that all of them require the expenditure of considerable money, which must ordinarily be raised by means of taxation. In conclusion, says the learned Justice: "For the same reason, "when authority to borrow money or incur an obligation "in order to execute a public work is conferred upon a "municipal corporation, the power to levy a tax for its "payment or the discharge of the obligation accompanies "it; and this, too, without any special mention that such "power is granted. This arises from the fact that such cor- "porations so seldom possess—so seldom, indeed, as to be "exceptional—any means to discharge their pecuniary ob- "ligations except by taxation."

The drainage assessments in this case being made obligations of the city it must be presumed upon, the same ground, that the legislation ontemplated that they should be discharged by the exercise of the power of taxation, rather than by the sale of the public places. Indeed, we may safely assume that these public places were not intended to be taxed in the ordinary sense, but that their area was placed on the tax rolls as a mere measure of the liability of the city to contribute to the cost of drainage, which was to be discharged by the levy of a general tax

in the customary mode. This view of the matter leaves nothing in the argument that the assessments are void because they lead to the sale of public things, which are beyond the power of a legislature to alienate.

As well might it be contended that a debt secured by a mortgage is invalid because the mortgage cannot be enforced.

In conclusion, on this point, we submit that when the legislature in 1876 authorized the city to purchase the property of Van Norden and to pay the price out of drainage assessments, it at the same time, by necessary implication, empowered and required the city to discharge its own obligation to the fund out of which the price was to be paid, through the exercise of the power of general taxation. This was directly held in County of Mc. Lean vs. City of Bloomington, 106 Ill., 209, quoted above.

IV.

As to the amendment of the constitution of the State, adopted in 1874 and going into effect on January 1st, 1875.

This amendment reads as follows:

"The City of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext. After the 1st of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to present a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt

be not thereby increased, nor to prevent the issue of drainage warrants to the transferee of contract under Act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The contention is that the act of the Legislature of 1876, which authorized the city to purchase the drainage plant and franchises is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

One answer to said ontention is, that the assessments, both against the city and individuals (which constitute the debt due by said city from which said warrants are to be paid) were all in existence long prior to the adoption of said amendment, and were levied and reduced to judgment as follows:

That in the First District was levied on September 13, 1861, (R. p. 110) and reduced to judgment for the first instalment thereof on March 11, 1863, (R. p. 24) and for the remaining instalments on Mar 21, 1874. (R. p. 28.)

That in the Second District was levied March 11, 1861, (R. p. 111) and for that part of said district lying in the Parish of Jefferson was reduced to judgment March 15, 1869, (R. p. 50) and for the part of said district lying in the Parish of Orleans, was reduced to judgment November 16, 1868. (R. p. 62.)

That in the Third District was levied June 11, 1872, (R. p. 111) and was reduced to judgment November 13, 1872. (R. p. 74.)

That in the Fourth District was levied November 19,

1872, (R. p. 112) and was reduced to judgment March 15, 1873. (R. p. 89.)

It seems to us that by its clear and express terms the amendment excludes from its operation the liability of the city, whatever such liability may be, growing out of its relation to drainage matters. The ordinance left, and intended to leave untouched all such liability. It affirmed the existence of the drainage fund in all its component parts, including the liability of the city as assessee of the streets, squares and other public places, which constituted nearly one-half of the fund; and it affirmed that the fund so established was applicable to the payment of all warrants drawn against it for drainage purposes, and incidentally recognized the validity of the Act of 1871, which confirmed and made exigible, *i. e.*, payable, the assessments against the city, as they appeared in the various tableaux and judgments rendered thereon. And lastly, it recognized and established the validity of the drainage contract, and affirmed the right of the city to issue, and of the transferee of the contract to receive warrants against the fund, as the Supreme Court of the State declared in 27 A. 497; where the court at page 499 said:: "The transfer, whether in pledge or in full property, made to him by said company, has been recognized by the Legislature in Act 22 of the Act of 1874, proposing an amendment to the Constitution, limiting the debt of New Orleans, and is now a part of the organic law of this State."

No other construction can be given the amendment without imputing to its authors the intention of defrauding

those who might deal with the city under its invitation and permission.

Yet the Court is asked to hold by construction that a constitutional amendment which authorized the city to draw warrants against this drainage fund, operated to destroy and render it valueless by prohibiting the city from paying into the fund the taxes out of which the warrants were to be satisfied Authority to draw warrants against the fund necessarily carried with it by implication a duty and obligation on the part of the city to apply the drainage taxes, including those the city itself owed to their payment. These taxes being debts of the city at the date of the adoption of the amendment, cannot by any course of reasning be included in the clause prohibiting an increase of the indebtedness of the corporation after January 1, 1875. The amendment, even if it had provided in express terms that no debt of the city of New Orleans should be valid, would be construed to apply to future transactions only, for it is a fundamental rule of interpretation that laws apply to the future and not the past.

McEwen vs. Dew, 24 H. 242.

But construing the amendment from a broader standpoint and by the light afforded by the circumstances under which it was adopted, it seems clear to us that the authors intended to exclude all matters of drainage from its operation, and to leave the city free to carry out the plan of improvement then in course of execution. The drainage work had been in progress during three years and was yet unfinished, and we think it may fairly be assumed that the purpose of inserting a clause in the amendment authoriz-

ing the city to draw warrants, payable out of drainage taxes, was to permit the city to complete the improvement and to use the drainage fund to its full extent for that purpose, as provided in the legislation then in force. The powers and duties of the city in this respect were neither abridged in terms, nor increased, but were on the contrary expressly continued and affirmed.

It is contended, however, by the learned counsel for the defendant that the assessments against the city are void and do not constitute a debt of the city, and that, therefore, the act of 1876, authorizing the purchase from Van Norden increased the debt of the city contrary to the prohibition contained in the amendment, and for that reason is void.

Our answer to this is that even if the drainage taxes assessed against the city were not debts, the amendment simply prohibits an increase of the city debt after January 1, 1875, but imposes no limitation on its right to contract an indebtedness after that date, unless its debt should thereby be increased in excess of the amount it then owed. Whether, therefore, the act of 1876, authorizing the purchase increased the debt, is a question of fact, which can only be determined by evidence showing the amount of the debt on the first day of January, 1875, and on the 6th of June, 1876, when the purchase was made. Neither the pleadings nor the proofs in this case show these facts. If, therefore, the act of 1876 did in fact for the first time impose on the city a liability for drainage taxes to the extent of $300,000, as contended by defendant's counsel, it does not follow that the debt of the city was increased thereby.

Certainly, this Court cannot assume the existence of the fact to support a mere suggestion that a law of the State is unconstitutional. On the contrary, courts always indulge the presumption that the legislature before passing a law, the constitutionality of which depends upon the existence of particular facts, found the facts to be such as to warrant the legislation.

In Cooley's Constitutional Limitations (5 Ed. 222) the author says:

"If evidence was required, it must be supposed that it "was before the legislature when the act was passed; and if "any finding was required to warrant the passage of the "special act, it would seem that the passage of the act "itself might be deemed equivalent to such finding." A very full discussion of this question will be found in the case of United States vs. Demoines, etc., 142 U. S. 544, to which we refer the Court.

But it can make little difference whether the act of 1876 was constitutional or not, because defendant has had the benefit of the act of the legislature of which he now complains, in the acquisition and enjoyment of property, acquired at a purchase made in pursuance of the provisions thereof.

In Daniels vs. Tierney, 102 U. S., page 415, the Court, at page 421 said:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself, for his own benefit, of an unconstitutional law, he cannot in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal

in another suit. In such cases the principle of estoppel applies with full and conclusive effect."

If the act of 1876 was in fact unconstitutional, the City of New Orleans contracted to purchase in error of law. D'Aguesseau, in his dissertation on Mistakes of Law, printed in Vol. 2 of Potier on Obligations, p. 350, says:

"Error of law ought not to give any person a title of "acquisition; the reason is evident, and Cujas comprises it "in his Commentary on Law, 8 ff. *de juris facti ignorantia*, "otherwise an ignorance of law would be an advantage to "one making a mistake. * * * Hence those "solemn definitions of law; ignorance of the law does not "profit those who are desirous of acquiring an advantage."

Domat, after declaring that error of law is not sufficient as an error of fact is, to annul contracts, says: "(1) If "error, ignorance of law, be such that it is the only cause "of the contract in which one obligates himself to a thing "to which he is not otherwsie bound, and there be no other "cause for the contract, the cause proving false, the con- "tract is null. (2) This rule applies not only in preserv- "ing the person from suffering a loss, but also in hindering "him from being deprived of a right which he did not know "belonged to him. (3) But if by an error or ignorance of "the law one has done himself a prejudice which cannot be "repaired without breaking in upon the right of another, "the error shall not be corrected to the prejudice of the "latter." See note at foot of Sec. 139, 1 Story Equity Jur.

Says the Supreme Court in Griswold vs. Hayard, 141 U. S. 284: "Mere mistakes of law stripped of all other "circumstances constitute no ground for the reformation "of written contracts."

And the law of Louisiana is in harmony with these principles, for Article 1846 of the Civil Code declares that error at law can never be alleged to acquire the property of another.

V.

Prescription of Five Years and Ten Years.

As to the prescription of five years claimed under Article No. 3540 of the Civil Code:

This article, under the settled jurisdiction of the State, applies only to unconditional promises to pay a fixed sum of money on a day certain, whether the obligation be negotiable under the law merchant or not. Conditional obligations which lack these essentials characteristics have never been held to come within its provisions. Defining what is a promissory note within the meaning of the article, the Supreme Court of the State, in Bank of La. vs. Williams, 21 An., 121, describes it to be "a written agreement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." In Thompson vs. Simmons, 22 An. 450, the same definition is again given, the Court holding that an instrument by which a party promised to pay a debt out of a crop, if he raised one, without fixing a definite time of payment, was an obligation contracted on both a suspensive and protestative condition, having none of the characteristics of a note, but giving rise to a personal action subject to the prescription of ten years under Article 3508 of the Civil Code. The same rule was followed by the Court in Bird vs. Livingstone, 1 Rob. 183, in dealing with an order payable conditionally out of a particular

fund, as the warrants are in this case. So, in Jewett vs. Irwin, 9 La. 231, it was held that an agreement of an agent to collect and pay over the proceeds of notes placed in his hands, as it did not bind him absolutely as a debtor, did not come within the prescription of five years, as provided in Article 3540 of the Code. And in Davidson vs. New Orleans, 34 An., at page 177, the Court said of the class of obligains in suit, as follows: "Payment of those warrants is, therefore, to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund when realized and if realized. It is to take place *only* from the drainage assessments or taxes "and not otherwise." The payment, therefore, was to be completely hypothetical, contingent upon eventicalities susceptable of happening, or not, and was glaringly restricted to well defined limitations."

The warrants, therefore, did not become due until there was cash on hand to pay them, which seems not yet to have happened.

Independent, therefore, of the fact that the city was an express trustee, and as such excluded from pleading the statute, the prescription of five years has no application to these warrants.

As to the prescription of ten years, claimed under Articles 3544 and 3547 of the Civil Code, which relates to all personal actions except those otherwise specially enumerated in said Code.

The first thing to determine here is the relation between the city and the drainage fund. Under the Act 30 of 1871,

from the time she took charge, she was a trustee of said fund, compulsory and non-contractual, it is true—as was decided in the Peake case, 139 U. S .342, and again declared in the present case, 167 U. S., page 477; and after the contract of sale on June 7, 1876, a voluntary and contractual trustee, as was decided in the case of Warner vs. New Orleans (this case), where she voluntarily contracted:

"Not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid ,it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same."

Whatever her relation before this date, she certainly after said date became, voluntarily, the trustee of an express trust, to-wit: (Perry on Trusts, Sec. 24), of the drainage tax assessments, and the law on this condition of things is, as declared in Lewis vs. Hawkins, 23 Wall, page 119, where the Court at page 126, said:

"As between trustees and *cestui que* trust, in case of an express trust, the statute of limitations has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que* trust are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation. * * *

A *cestui que* trust cannot set up the statute his *co-cestui que* trust, nor against his trustee. These rules apply to all cases of express trusts. As between trustees and *cestui que* trust, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being possession of the *cestui que* trust."

In Perry on Trust, this law is stated in Section 863 as follows:

"As between trustee and *cestui que* trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust, time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui*. Such a trust is only barred on the doctrine of prescription of twenty years, and so long as the relation of trustee and *cestui* continues unbroken, the possession of the trust is that of the *cestui*, and there can be no adverse possession for the time to run upon. The trustee must clearly repdiate the trust and assume an adverse position, without notice to the *cestui*, before the statute can begin to run. When these facts exist for twenty years an action to recover the land is barred; and when the relation of trust is denied, or time and acquiescence have obscured its nature, or acts of the parties raise the presumption unfavorable to its continuance, the lapse of time may be a ground for refusing relief. The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands, does not change the nature of the debt; it continues to be a trust debt, upon which neither bank-

ruptcy of the trustee nor the statue of limitations can take effect. Accounts have been decreed against trustees, extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que* trust are such that the possession of one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation.

Lord Justice Knight Bruce said that where one entered into possession as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que* trust.

It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver the possession which he received as trustee. He will then be in position to maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence should be allowed to set up adverse title. The rule applies to all acting as trustees, whether regularly appointed or not. It also applies to all who stand in a fiduciary relation to others, as executors, administrators, guardians or agents. A *cestui que* trust cannot set up the statute against his *co-cestui que* trust nor against his trustee. If one hold title to land as security for money; and the money is paid to him and received, he cannot plead the statute as a bar to a bill for reconveyance. These rules apply to all cases of express trusts. After the termination of a trust a reasonable time is allowed for settlement, and then the statute begins to run. The statute does not run in favor of a trustee against his *cestui* while the latter is

in possession. After the statute begins to run in favor of the *cestui* the death of the trustee will not stop it."

And the City does not pretend that she has ever disavowed the trust first imposed on her by statute, and lastly voluntarily acknowledged and assumed in the act of sale. On the contrary, the answer filed in this case constantly asserts that she has, faithfully, and at all times performed her whole duty, by enforcing the collection of drainage taxes to the full extent of her power and ability, acts utterly inconsistent with repudiation of the trust. Beginning at page 192 declares:

"Subsequent to said Act of 1876, it applied itself with great diligence, and to the full extent of its abaility to improve and make serviceable, the canals, levees and other drainage work of said company and its assignee, and to drain the lands, and this defendant established a bureau, or office in the City Hall, and the holders of drainage warrants appointed an agent, who was placed in charge of the same * * * to proceed with the collection of drainage taxes, who gave such instructions as he deemed judicious, as to the collection of such taxes, which were always followed by the officials of the respondent," (the city) "and besides, respondent did all in its power to prosecute the collection of the same; and the service of the attorneys and executive officers of respondent in this behalf, were directed at all times to such collections * * * ; the drainage taxes were extended on the regular tax bills of this respondent, asserted and claimed in every account filed in the courts by administrators, executors, syndics and per-

sons exercising like authority, * * * and by said modes and others, collections were made and accounted for."

Similar assertions are found throughout the answer, and finally the city has filed schedules showing the collection and disbursement of drainage taxes up to June, 1891—all in affirmance of the trust. (R. pp. 319 to 349.)

The burden of the answer is, that while the city is a trustee for drainage taxes, and has executed her trust faithfully, by collecting assessments against private persons, she has not accounted for the taxes assessed against herself, because she does not legally owe them.

Nor does prescription run against the claim of a trustee as long as he remains in administration of the trust property. See Succession of Farmer 32, An. 1037, because the trustee cannot sue himself, and hence prescription remains suspended during the term of administration. At page 1041 the court said:

"Being incapacitated from judicially enforcing her claim by the law itself, prescription necessarily is suspended, and the doctrine of *contra non valentam*, etc., is clearly applicable to administrators, curators or tutors thus situated."

And on the other hand the administrator of a succession cannot plead prescription as long as he remains such, in discharge of his own liability. See McNight vs. Calhoun, 36 Ap. 408.

Nor are the taxes assessed for drainage purposes subject to any prescription.

In the case of School Directors vs. City of Shreveport, 47 An., 1310, the court at page 1312 said:

"The amount collected by taxation for a specific purpose is a trust fund. The application of the fund is usually enforced by mandamus. We cannot see the application of prescription to protect the municipal corporation from liability for the funds thus collected and withheld."

In Reed vs. His Creditors, 39 An., 115, the court held tax laws were *sui juris*, and that the provisions of the Civil Code under the title of prescription does not apply to taxes, citing State ex rel., Jackson vs. Recorder, 34 An., 178, and Davidson vs. Lindoff, 36 An., 765, and we take it to be a general rule that unless the law which a tax is assessed provides a limitation, none exists. The most conclusive case of all on this subject is that of Davidson vs. Lindoff, 36 Annual, where the Court, at page 766, recites the provision of the City Charter, as follows:

"Section 20 of the City Charter of 1870 provides: 'That the taxes assessed and levied by virtue of this act, * * * are hereby dec lared to be a lien and privilege upon said property, * * * and said lien and privilege shall exist in favor of the City of New Orleans * * * until the same shall be fully paid; and the same shall be paid in preference to all mortgages and encumbrances other than taxes due the State."

And then said:

"Under this law the tax privileges of the City of New Orleans were practically imprescriptable."

The statute under which the assessments herein were levied is even stronger than the above, for after providing for the creation of the mortgage to secure said assessments, declared in the latter part of the 7th section therof:

"Said lien, privilege and first mortgage shall take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and shall attach to said property until the amount assessed and interest thereon shall have been paid in full."

Surely under the authority of the last case the taxes involved in this suit are imprescriptable.

And so strictly is the statute of prescription construed, that it applies to future and not prior assessments. City vs. Vrigole, 33 An., 39; Succession of Dupuy, 31 An., 781; 34 An., 178.

There is no prescription applicable to drainage taxes, but in no event could such statute be pleaded by the City owing taxes while she was trustee, and a trustee who owes a debt to the trust is treated in law as if he had collected the same, and is charged with the amount as an asset in hand.

Perry on Trusts, Sec. 440; Stevens vs. Gaylard, 11 Mass. 269; Sigourney et al., Admr., vs. Wetherell, 6 Mat., 557-558; Leland vs. Felton, 1 Allen, p. 533; Commonwealth vs. Gould, 118 Mass., 307.

We then have a case of a trustee with trust money in hand claiming it is his by prescription of 10 years. Such a claim apart from its morality, and apart from its being shocking to the judicial sense, is equally bad in law, for it has never (until within a few years past) been claimed that the judgments based on the assessments on the streets and squares were not due, and in fact—as before stated—its plea of payment is the broadest admission of the debt due.

The City certainly admitted the debt was due in the First District in 1868, when a judgment was rendered against it, for the first instalment thereof, and it appealed therefrom and thereafter acquiesced in the judgment by abandoning its appeal. (R. pp. 266 to 269.) It certainly again admitted the other nine instalments due on said assessment when it filed the rolls therefor in Court and asked for their homologation, and when said rolls at its request were homologated. And certainly said assessments were due in said 1st and 2nd districts when they were confirmed and made exigible by Act 30 of 1876. The City certainly admitted her debt when she filed the rolls for the third and fourth drainage districts and procured their homologation in the said third and fourth districts. And she admitted said debt in the most solemn manner known to the law. She confessed judgment for the same.

The debt therefor, springing from the assessments on the streets and squares, is not only admitted, but judicially declared.

Of such a debt, Perry on Trusts, Section 440, declared:

"If the trustee himself owes the estate, he must treat his indebtedness as assets collected."

In Stevens vs. Gaylord, 11 Mass., 269, the Court said:

"As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money and is answerable for it."

In Sigourney and another Admr. vs. Wetherell and Others, 6 Metcalf, pages 557 and 558, the Court said:

"It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor

executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect he now stands on the same footing with an administrator. But as an executor or administrator cannot demand or receive payment of himself, and cannot sue himself, and yet is bound to account for his own debt,, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as aginst the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid. Whether the crediting of his own debt in his probate accounts, and even a decree of distribution upon them, where there has been no actual distribution under such decree, would be so far regarded as actual payment as to exonerate a surety, or discharge any other collateral liability, is a distinct question, the decision of which is not necessary in the present case. It is sufficient for the present case that the administrator is bound to account for his own debt, as a debt paid, and as assets, without act or ceremony."

In Leland vs. Felton, 1 Allen, page 533, the Court said:

"The liability of an executor or administrator to be charged as such in his account of administration for all debts due from himself to the person upon whose estate he administers has been frequently held by this Court. It was directly affirmed in the case of Stevens vs. Gaylord, 11 Mass. 269, where it was said: 'As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator.' 'The con-

sequence is, that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased.' This case was followed by that of Winship vs. Bass, 12 Mass. 198, to the same effect; as were also the cases of Ipswich Manufacturing Co. vs. Story, 5 Met. 310, and Sigourney vs. Wetherell, 6 Met. 533."

And in Commonwealth vs. Gould, 118 Mass., at page 307, the Court said:

"The receiver was obliged by his bond to account for the moneys borrowed by him from the corporation before his appointment, and his omission to pay the amunot thereof to himself as receiver was a breach of the bond, for which he and his sureties are equally liable The case falls within the general rule of law, that when the same person is liable to paymoney in one capacity, and recover it and account for it in another, the law presumes that he has done what it was his duty and within his power to do, and holds him and his sureties responsible in case of his failure to do it. The rule has been aplied by this Court to cases of executors and administrators, assignees in insolvency and guardians."

Surely under no system of law could it be successfully contended that an agent or trustee, who has collected and holds the money of another, ever could become the owner thereof, or be discharged from liability to pay it to the rightful owner. Nothing short of payment would be a discharge.

And such payment—as we have seen—was never pretended until it was for the first time contended for in the

answer filed in the Peake case on March 19, 1888, and even this plea cannot prevail here as was decided by the Supreme Court and the Circuit Court of Appeals. 167 U. S., p. 467; 81 F. Rep. p. 650.

Under the settled jurisprudenct of Louisiana, the prescription of 10 years cannot prevail in this case, for it has not yet begun to run. As was decided in the Succession of Farmer, prescription does not begin to run in favor of the estate and against the administrator or executor, while the administration lasts, nor does it run in his favor, while said administration lasts, 36 An. 408. In fact it neither runs for or against said administrator, but is entirely suspended.

When we apply this law to this case ,what is the result? The averments of the answer and the accounts, furnished by the defendant, shows an uninterrupted administration from the time the City took charge of the drainage taxes in 1871 to 1891, and hence a complete interruption of prescription is applicable to a case like this.

Perhaps the most conclusive case against the defendant on the plea of prescription, is that of the Insurance Co. vs. Pike 32, An., 483. That, as this was a case for an accounting, and in the first case the Court held there was no prescription, which would protect an agent from accounting, and in the second case, after the account was filed, and showed more than 10 years had elapsed from the time the last money had been collected, the Court allowed the prescription of 10 years.

Both of the above decisions are against the contention of complainant. The former, because there is no prescrip-

tion against an accounting, and the second because the answer in this case, and the accounts filed, show the administration was continuous from 1871 to 1891.

But apart from the above, there is no prescription whatever applicable to taxes, as we have shown.

In the Lower Court, the contention on this subject was rather, that the judgments homologating the assessment rolls were prescribed by 10 years, from the date of homologation, and hence the defendant could not be held to account for them, but surely, the trustee having charge of an estate, could not be allowed to say, he has permitted the same to be lost because of not taking the necessary legal steps to preserve said estate, and then plead his own dereliction of duty in discharge of his liability to account. If such judgments were prescriptable by 10 years, which we deny, then it was the duty of the City to have instituted proceedings for their revival, which as a matter of excessive precaution she did so, and said proceedings are still pending.

Referring again to the question of prescription the city, in its brief, expressly disclaims the benefit of any prescription against its liability as a trustee of the assessments against private persons and property, but merely claims that the assessments against itself and as *quasi* owner of the streets and squares are prescribed. Counsel for petitioners say, at page 29 of their brief, "the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims the judgment against herself has been extinguished by prescription."

And in said proceedings to revive the aforesaid judgments of homologation, (evidently acting in pursuance of the clause of the statute given on page 87 of this brief) defendant judicially declared said judgments were not prescriptible, in the following language:

"Petitioners further show that, in their opinion it is unnecessary to take proceedings for the revival of the judgments had and obtained as aforesaid; but to protect the rights of all parties interested therein from being clouded over; and out of abundance of caution, your petitioners, without waiving or abandoning any privileges or rights conferred by the judgments aforesaid, desire to supplement the same, by an order or decree of revival." (See Record, pp. 79 and 54.)

As the assessments against private persons amount, in round numbers, to $733,00, and those against the city to $700,000, exclusive of statutory interest due thereon, and either amount will be sufficient to pay the warrants involved in this suit, the prescription claim by the city is not material. The same may be said as to the question of the liability of the city for the assessments against it—whether they are paid or prescribed, if valid, it is not material, as the private assessments with interest thereon are sufficient to pay the warrants.

VI.

As to the contention of *res adjudicata* based on the decree in Peake vs. New Orleans, 139 U. S., p. 342:

The matters necessary to constitute *res adjudicata* are thus stated in Lyon vs. Perin Manufacturing Co., 125 U. S., page 700, as follows:

"It is well settled that in order to render a matter *res adjudicata* there must be a concurrence of the four conditions, viz.: (1) Identity of the thing sued for; (2) Identity of the cause of action; (3) Identity of the parties and persons to the action; (4) Identity of the quality in the persons for or against whom the suit is made."

In the case at bar neither the parties or the cause of action are the same as in the Peake case.

In the latter case, Peake was the original complainant, and afterwards there was an intervening bill by James Jackson, and the City was defendant, but at no time, and in no manner, was the complainant a party to that case.

It is true that bill was brought by Peake for himself and

others similarly situated who might intervene for their interest therein, but surely it would bind only those who did so intervene.

In the case of Calhoun vs. St. Louis and S. E. Ry. Co., 14 Fed. Rep., page 8, Judge Pardee said:

"The equity rules that allow suits to be brought by some complainants for the benefit of all, expressly reserve the rights of absent parties."

See also the case of Hook vs. Payne, 14 Wall., page 252, where the head note is as follows:

"1. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor.

"2. If such persons do not appear before the master, no decree can be made for or against them, because they are not to be bound thereby."

Nor is the cause of action the same. The Peake case was based on drainage warrants issued for drainage work done under Act 30 of 1871. This case is based on drainage warrants given to Van Norden for his drainage plant, pursuant to Act. 16 of 1876, and issued under a bill of sale containing express and implied warranties coming into existence long after said work warrants were issued.

It is contended that purchase warrants were the basis of the intervening bill of Jackson in the Peake case, but this we think is an error. Jackson's intervention was not based on warrants of any kind, but on a judgment of law,

recovered on warrants without any declaration whatever as to whether the basis of said judgment was work or purchase warrants, (R. pp. 358 to 363) while the bill in the Peake case shows the consideration of the judgment made the basis of the Peake spit were work warrants, as follows:

"And your orator further shows that he is the holder and owner of a certain judgment based on three of the above named warrants, issued under and in pursuance of the above Act No. 30 of 1871, for work and labor done by the said Mexican Gulf Ship Canal Company, and said W. Van Norden, trans feree thereof under the provisions of said act, and measured and accepted by said City of New Orleans, etc." (R. p. 150.)

The averment of Jackson is, (R. p. 358) that his warrants are similar to those described in the bill of complaint of Peake. In his intervening bill (R. p. 358) he says as follows:

"That since the year of 1879 he has been the holder and owner of eight drainage warrants issued to the City of New Orleans according to law and similar to those described in the bill of complaint of complainant, James W. Peake, the original plaintiff in this suit; that all said warrants are dated June 6, 1876, and are numbered from 322 to 329, both inclusive, and are each for the sum of $5,000, except No. 329, which is for the sum of $10,000, making in all an aggregate sum of $45,000.

"That your orator, on April, 1887, instituted suit on said warrants on the law side of this Honorable Court, and on December 3, 1887, recovered of the defendant, the City of

New Orleans, as provided by Act. No. 30 of 1871, as the successor of the drainage commissions, established under Acts No. 165 of 1858, and No. 191 of 1859, and the various acts amendatory thereof, the sum of forty-five thousand dollars ($45,000), with eight per cent interest from June 6, 1876, and costs of suit; that your orator issued a writ of *fieri facias* on said judgment on 30 December, 1887, and the same was returned by the marshal on 8 March, 1888, no property found after due demand, all of which will appear by the record of said suit, numbered 11,558 on the docket of this Honorable Court.

"Your orator is similarly situated with the complainant, James W. Peake, and desires to unite with him in the prosecution of his suit," etc.

It nowhere appeared in that case, either by the pleadings or proof, upon what kind of warrants Jackson's judgment was based, and, as the pleadings show, Peake's averred judgment was based on warrants given for "work and labor done" * * * under the provisions of Act 30 of 1871, and Jackson's pleadings declared the warrants on which his judgment was based were "similar to those described in the bill of complaint of James W. Peake, and on Jackson's averment that he was similarly situated with complainant, James W. Peake, it is clear the whole case was treated and decided as a case based on work warrants. Any difference between the two classes was, therefore, never before the Court.

It is true that the Circuit Court, in its opinion in that case, declared the purchase warrants were "in precisely the same catagory as the other drainage warrants issued for

work," but as we have before shown, this was a mistake and was a matter not embraced in the pleadings, and the Court's opinion can have no effect outside of said pleadings. As was said by Judge Wallace, in Oglesby vs. Attrill, 20 Fed. Rep., p. 570:

"What the Court said is valuable as a contribution of legal learning, but if the Court has given very poor reasons for its conclusions, the fact of the adjudication would have been the same."

But as before stated, this precise question of the city's liability to account for the drainage taxes existing at the time of the purchase from Van Norden, has already been decided and in this very case.

VII.

It is contended the court grossly erred in decreeing the city was the absolute debtor of the drainage warrants sued on, while all the bill sought to obtain was an accounting of the drainage taxes, and that in no event could said warrants sued upon, be considered the unconditional obligations of the city until it was shown all the taxes had been lost, misappropriated or misapplied, even if then, which is denied.

The latter can only relate to the assessments due by individuals, for which the city, by her conduct, and by warranties expressed and implied has made herself liable, but there are many answers to the entire contention, and among them are the following:

In the first place, the court has never decreed the city was the absolute debtor of the warrants sued upon. A

mere inspection of the decree (R. p. 550) shows the contrary. The city is decreed to be the debtor of the complainant Warner for $6,000 with interest, to be paid in principle and interest "out of the drainage assessments set forth in the bill filed herein," which assessments the decree declares "constitutes a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants," &c., and the matter is then referred to a master to take and state an account, and that upon the coming in of said account, complainant will then be entitled to an absolute decree against defendant for the amount due him if the fund established by said accounting shall be sufficient to pay all warrant holders of the same class, and if not he shall recover his pro rata. There is no absolute decree against the defendant to be paid in any event, but a decree to be paid out of a particular fund of which the city is the administrator, and to which it is decided she is the debtor.

Nor is it true that it has not been established that all of the drainage assessments against individuals have not been lost or misapplied. In the 18th paragraph of the bill (R. p. 12) it is alleged that ever since said purchase, the city has done nothing to compel the payment of the drainage assessments except keep an office open where the same might be voluntarily paid, that she has adopted ordinances, and pursuant thereto the mayor of the city, by public proclamation, advised the persons owing the said assessments not to pay the same, and has done other things there enumerated to destroy the drainage fund, and by reason there-

of, and by reason of not completing said system or adopting another and draining the land, the Supreme Court of Louisiana, in the 34 An., p. 170 decided said assessments could not be enforced or collected and that this decision has become the settled jurisprudence of the State, and that since the date thereof the assessments have little or no value. And by the 19th paragraph of said bill (R. p. 14) it is alleged said assessments have now (the date of filing said bill, November 26, 1894,) "become uninforcible and worthless to holders of drainage warrants given for the purchase of the aforesaid dredge boats, implements and franchise, which from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise provided any means for the payment of said warrants, or offered any restitution of said property."

The record is full of proof in support of the above allegations, but happily we are relieved from any reference thereto, for the defendant in his answer admits (R. p. 196) "that large amounts of drainage taxes have been cancelled and erased under this decision, and that it has become the settled jurisprudence of the State ,but this defendant denies that said taxes have been lost 'in consequence of the suggestion or proclamation' put forth by defendant, but that said erasures and cancellations have been solely because, under the decisions of the courts, the collection of the drainage taxes could not be enforced."

Nor is it true that the bill asked merely for an accounting of the drainage tax as an inspection of its prayer will show, but further asked that from the sum found due on

said accounting complainant and other parties similarly situated be paid to the full extent of their warrants with interest thereon.

VIII.

As to the 19 different errors assigned in the petition for a rehearing, filed in the Circuit Court of Appeals, and now made part of the errors herein assigned, we have simply this to say The same errors are substantially assigned in the petition herein, and hence are answered under the discussion of said assignment of errors in the brief herein set forth.

IX.

As to the alleged wrongful allowance of eight per cent interest on the warrants sued on, from the date of their issue, and es pecially as the act of sale did not provide said warrants should have interest.

A very slight examination of the statutes under which they were issued will show how utterly unfounded this contention is.

Act No. 16 of 1876 (Stat. p. 15) after providing the city might purchase in case she deemed it advisable so to do, upon an appraisement of the property to be purchased, further provided:

"That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the City of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of said company, under act No. 30 of acts of 1871, for work done. They shall be made payable out of the drainage assess-

ments, and shall be issued as soon as any agreement shall have been completed."

What is the "form and manner" of warrant provided for under said act 30 of 1871?

The 8th section of said act, (Stat. p. 11) after providing that the work done during each month should be measured by the city surveyor and the cubic yards thereof certified by him, further provided:

"It shall be the duty of the Administrator of Accounts on the presentation to him of said certificate of the City Surveyor or Engineer appointed by the Board of Administrators, by the President of said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavating and fifty (50) cents per cubic yard for protection levee, and said warrants to be of such denomination as may be required by the President of said Company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient fund to cash the said warrant or warrants, then the Administrator of Finance is hereby required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

This manner and form and the condition in said sec-

tion provided for is fully set forth in th warrant sued upon, (R. p. 109) and the said presentation thereof to the Administrator of Finance por payment is proved by his endorsement thereon, from which date (June 6, 1876) as the decree complained of rightfully declares shall "bear interest at the rate of eight per cent per annum until paid."

It was, therefore, not necessary that the act of sale should declare what interest the warrants should bear, for this was provided for, by act 16 of 1876, in connection with section 8 of act 30 of 1871.

Without the provision for interest at eight per cent per annum the warrants to be issued would not be in the manner and form and would not contain the *condition* provided for in said act 30 of 1871.

But, independent of said statutes, it is the jurisprudence of Louisiana that all debts bear interest from the time they fall due, and these warrants fell due from the date of their presentation, June 6, 1876.

X.

As to the alleged unfairness and fraud in the contract of sale of June 7, 1876, under which the purchase warrants were issued.

A charge more unfounded in fact and worthless in law was never made, and it would seem that no one but a mere tyro in the profession would attempt to collaterally impeach a sale when he is asked to pay the price due thereunder, without, at least, sepcifying some act of fraud on the part of the vendor.

In all the numerous litigations that have been had in

this matter—the Crossly cases (R. pp. 134 to 142), in the Peake cases (pp. 160 to 164), and numerous others—such an allegation was never made before the filing of the answer in this case on October 30, 1897, (R. p. 186) more than 21 years after the sale was made, and no suit has ever been brought to have said sale set aside for error, fraud or mistake, nor is there a cross bill filed herein.

It is true the sale of the dredge boats to Van Norden was made for $50,000, which was credited on an amount of $161,962.86, which the seller then owned himself, (R. p. 105) but the proof does not show, and it was not necessary in this case that it should show the amount of lien claims existing against said boats at the time, which he subsequently discharged.

And that said dredge boats were not in bad condition as alleged, but in a first-class condition at the time of sale, is shown by the evidence of Moody (R. p. 274), and by the report of the city's own appraiser, who not only reported them in good condition, but that their original cost was $205,000 from which he made a deduction of 25 per cent "for wear and tear from use and deterioration by age," and made their value $157,750.00. (R. pp. 91 to 97.)

But the dredge boats were not the only things the city bought and paid for. As she was authorized to do, by the act No. 16 of the legislature of the year 1876, having the value of the boats fixed as above, she bought from Van Norden and the Canal Company, not only said dredge boats but also the exclusive franchise granted under act 30 of 1871, and settled claims for damages against the city for a very large amount, and which he was entitled to for delay, under the provisions of act 30 of 1871, and the amount to be paid for all of the above (and not for the

dredge boats alone as is alleged) was determined after the above appraisement and report of said city surveyor, by resolution of the Council of the City, at $300,000, which said resolution (R. p. 104) declared was:

"For the purchase of all dredge boats, derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or its transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor; also for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the City of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company, and transferee, under and by virtue of act 30 of 1871, or under and by virtue of all other acts of the legislature of the State of Louisiana or ordinances of the City of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole." (R. p. 94.)

We submit, the decree is clearly correct on the law and the facts of the case, and should be affirmed with costs.

Respectfully submitted,

RICHARD DeGRAY,
Solicitor for John G. Warner.